Petition

81-1899

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1981

HARRY P. JANNOTTI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

GEORGE X. SCHWARTZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the government's conduct of the ABSCAM operation violated the most basic standards of due process and fundamental fairness, reaching and exceeding that degree of outrageousness which mandates dismissal of this prosecution?

2. Whether, where the evidence of governmental inducement is overwhelming, the government can meet its burden to disprove entrapment when the only proof of predisposition offered is the fact that the defendant committed the criminal act, which proof demonstrates neither his pre-existing criminal inclination nor familiarity with criminal techniques and procedures, and was manufactured, in its entirety, by the government?

3. Whether, given the constitutional limitations inherent in Congress' power to legislate under the commerce clause, federal jurisdiction under the Hobbs Act can be predicated upon wholly fictitious facts and circumstances which could never have had, at any time, any actual or potential effect on interstate commerce and which "facts," in any event, were formulated and injected into the transaction in question by the government?

4. Whether, under the Hobbs Act, criminal convictions for extortion can be sustained absent proof of "inducement" by the defendants charged?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners above named respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, sitting in banc, entered in this case on February 11, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, sitting in banc, reversing the opinion of the United States District Court, is not yet reported. A copy of this opinion is printed in the Appendix at A. 1.

The opinion of the United States District Court for the Eastern District of Pennsylvania, which was reversed by the appellate court, is reported at 501 F. Supp. 1182 (E. D. Pa. 1980). A copy of this opinion is printed in the Appendix at A. 129.

The opinion of the United States District Court for the Eastern District of Pennsylvania, dismissing the substantive Hobbs Act charges, is not reported. A copy of this opinion is printed in the Appendix at A. 107.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, reprinted in the Appendix, at A. 181, was entered on February 11, 1982. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment V:

> No person shall . . . be deprived of life, liberty, or property without due process of law; . . .

United States Code, Title 18:

> § 1951. Interference with commerce by threats or violence (the "Hobbs Act")

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

§ 1962. Prohibited activities (Racketeer Influenced and Corrupt Organizations Act: "RICO")

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

STATEMENT OF THE CASE

ABSCAM was conceived in 1978 by F. B. I. agents in New York along with a career swindler and convicted felon, Melvin Weinberg. Originally, ABSCAM was designed to recover stolen property, but it evolved into a government-backed endeavor to bribe public officials, thus changing the government's role from that of a traditionally passive buyer of stolen property to an aggressive instigator, seeking out officials and offering bribes to them.

ABSCAM was characterized throughout by clever strategies and substantial inducements—the "honeypot" according to Weinberg—designed to attract potential targets of the scheme. Substantial legal fees, lucrative investment opportunities, and large amounts of money were offered to the victims of the scheme, and the impression of an Arab sheik with vast amounts of money to spend freely was continually fostered by the F. B. I. Likewise, the F. B. I. agents repeatedly and effectively employed the concept of "the Arab mind" or "the Arab way of doing business" [1] to persuade their victims that they must accept the money offered to them to convince the fictitious sheik of their friendship.

The government also recruited and used "middlemen" to assist in the scheme, among them Howard Criden, a Philadelphia lawyer who brought both petitioners Schwartz and Jannotti into the ABSCAM net. Criden, as were various other middlemen, was compensated by

1. See the District Court's discussion of the "Arab mind" technique and the manner in which it was employed, at A. 151-152.

contingent fee based upon the number of officials he could produce for the government. He also received continuing promises of substantial, future legal fees and other lucrative investment opportunities.

Criden was taught early in ABSCAM by Weinberg and another middleman, Mayor Angelo Errichetti of Camden, New Jersey, that the officials who were brought in to meet the sheik and his "associates"—the F. B. I. agents—need only come on strong, emphasize their importance, and that no official would be called upon to perform. A. 152-153. Criden also intentionally deceived the F. B. I. by having an associate in his law firm impersonate an immigration officer to obtain a $50,000 fee. The ruse did not work and the F. B. I. learned of the deception. Nevertheless, the F. B. I. continued to utilize Criden and to accept without question his representations regarding the honesty and reputations of public officials who were the ultimate victims of ABSCAM.

The Philadelphia aspect of ABSCAM was authorized by the F. B. I. only for a ten-day period, was the last major operation conducted by the ABSCAM operatives, and was designed to test the integrity of city officials.[2] No infiltration or discovery of ongoing criminal activity took place or was intended by the government. Rather it created a criminal enterprise and actively attempted to involve innocent persons in its operations. The scenario employed by the F. B. I. centered upon the sheik's plan to construct a fictitious $35 million hotel in Philadelphia, with its resultant, major impact on the city's economy. But the record is devoid of any evidence that payments of money to

2. The Philadelphia U. S. Attorney testified that his office actively lobbied for an opportunity to conduct a Philadelphia ABSCAM operation, attempted to devise strategems to justify bringing ABSCAM to the city, and formulated a scenario which would result in violations of federal law.

any city official were either sought or required or that any Philadelphia official would have to be dealt with in connection with the proposed hotel project.

Following a series of telephone calls from Weinberg to Criden, on January 18, 1980, Criden met with F. B. I. Agent Michael Wald, who passed himself off as a representative of the fictitious sheik.[3] Wald pressed Criden for introductions to various municipal officials. He specifically requested a meeting with petitioner Schwartz and Councilman Louis C. Johanson, Criden's law partner, despite Criden's protestations that their assistance was unnecessary given the sheik's prior relationship with two Philadelphia congressmen. Wald then unilaterally raised the issue of payments and agreed to pay Criden $10,000 for the production of Schwartz and Johanson. As of this time, Criden had never met or had any prior dealings with Schwartz.

Later that day, Johanson met with Wald. He agreed to support the hotel project and accepted a $25,000 payment. At the end of the meeting, Wald gave Criden $5,000 and promised him "5 for the next delivery." Johanson testified that, based on his earlier meeting with Criden, he thought the payment was a retainer for legal services which his law firm would perform on the hotel project. Johanson also testified that as the meeting progressed, he became aware that it "wasn't kosher." Later, and because he thought he had been duped by Criden, Johanson refused a request by Criden for an introduction to petitioners, since he felt they were good men whom he did not want to involve in improper activities.

On January 23, 1980, Schwartz met with Criden and Wald.[4] During the meeting, Schwartz repeatedly

3. The meeting with Criden, as were the subsequent meetings with petitioners, was videotaped by the government.

4. Criden had obtained an introduction to Schwartz through a mutual friend, Philadelphia Common Pleas Court Judge Thomas

pitched Philadelphia, told Wald that the "climate is good" for a major construction project, and noted that any problems arising in connection with a proper and legitimate project could be overcome administratively. Schwartz also advised Wald of his power and influence within City Council and that he, Schwartz, had previously rendered assistance to other developers of major construction projects in Philadelphia. Wald assured Schwartz that the project was a legitimate one but emphasized that, if the project was to be built in Philadelphia, he must have Schwartz' assurance that there would be no problems. Schwartz repeatedly advised that no guarantees could be given but that, as long as the project was legitimate, any problems could be resolved.

Significantly, when Wald first mentioned payments, Schwartz made it clear that money was not the motivating factor behind his agreement to assist with the project. Throughout the meeting, Schwartz discussed the available financing opportunities and the best law firms to employ in connection with the project. Near the end of the meeting, Wald again told Schwartz that he must have Schwartz' unequivocal assurance that everything could be taken care of if he was to report to the sheik that the hotel project could be placed in Philadelphia. Schwartz reiterated that he "cannot give you a guarantee that there won't be any problems" but that so long as the project was legitimate, administrative procedures in Philadelphia could assist in resolving those problems. At the end of the meeting, a payment of $30,000 was given to Schwartz. Wald then

4. (Cont'd)

Shiomos. Shiomos testified that Criden told him that Criden's clients wanted to hire Schwartz as a consultant and to pay Schwartz for his advice and that he, Shiomos, told this to Schwartz. Judge Shiomos testified that he saw nothing "improper or fishy" in this proposal and so advised Schwartz. A. 159-60.

gave Criden $5,000 for delivering Schwartz and urged Criden to deliver petitioner Jannotti.[5] Although, as with Schwartz, Criden did not know Jannotti prior to the meeting, Criden boasted on tape to Wald that he knew Jannotti well. The F. B. I. did not attempt to verify Criden's plainly false assertions of knowing Schwartz, and it did nothing to verify his assertions concerning Jannotti.

On January 24, Criden produced Jannotti for the hidden cameras. During the Jannotti meeting, and following an initial discussion of the hotel project, Jannotti was repeatedly told by the F. B. I. of the requirements of the "Arab mind," and that the sheik insisted upon making friends and resolving problems before they arose. Wald asserted that the "Arab mind" required that Jannotti accept the payment of money to prove his friendship if the sheik was to construct the hotel in Philadelphia.

Jannotti repeatedly expressed his interest in the project, his feeling that the project would be a great benefit to the city, and his support for the hotel because it was a legitimate project. However, each time that Jannotti showed reluctance to accept money, the F. B. I. agent increased the intensity of his presentation until ultimately Jannotti accepted a $10,000 payment. Once Jannotti left, the F. B. I. agents, obviously frustrated because of Jannotti's demeanor and lack of understanding or interest in the proffered payment, expressed their displeasure to Criden.

Petitioners were indicted for conspiracy under 18 U. S. C. §§ 1951 (the "Hobbs Act") and 1962 (the "Racketeer Influenced Corrupt Organizations Act" or "RICO") and also for attempts to violate the Hobbs Act. The attempt charges were dismissed by the District Court

5. Also, during this meeting between Criden and Wald, Wald pressed for introductions to other city officials with whom he could "deal," naming, among others, the mayor and the former mayor of the city of Philadelphia and various councilmen.

prior to trial, and the government did not appeal. A. 107 Petitioners were subsequently tried on the two conspiracy counts. Following a six day jury trial, petitioner Schwartz was found guilty of both the RICO and Hobbs Act conspiracy charges. Petitioner Jannotti was found guilty of the Hobbs Act conspiracy charge but was acquitted on the RICO count.

During the trial, the government placed almost total reliance on the video tapes. The government did not present independent proof of any actual, potential or any other effect on interstate commerce as a result of petitioners' conduct and, aside from its own agent, Criden, presented no evidence of a "pattern" of racketeering. Likewise, the government introduced no evidence that petitioners sought, requested, solicited, demanded or otherwise affirmatively expressed the need for any payment of money in exchange for official services. Finally, the government introduced no extrinsic evidence of petitioners' predisposition and relied solely upon the events of the meetings and strained inferences from other peripheral evidence to prove predisposition. Both prior to trial and following the trial, the District Court held extensive hearings on the due process issues.

After verdict, petitioners moved for judgments of acquittal. By Memorandum and Order dated November 26, 1980, the District Court set aside the verdict in its entirety, dismissed the Hobbs Act conspiracy counts for lack of jurisdiction, and granted petitioners' motions for judgment of acquittal. A. 129.

The government appealed the District Court's ruling and, on February 11, 1982, the United States Court of Appeals for the Third Circuit, sitting in banc, reversed the District Court's decision by a seven-to-two vote, A. 1, and directed reinstatement of the jury verdict. The instant petition to this Court followed.

REASONS FOR GRANTING THE WRIT

With this, the first ABSCAM prosecution to reach this Court, it is now time to confront directly and resolve the critical issue raised by the government's ABSCAM operations: will our legal system permit federal investigative and prosecutorial agencies to create crime, to target and solicit their potential victims, to influence these victims by the use of uncontrolled middlemen and by the tendering of substantial inducements to them, and to script, manufacture, and mold the evidence which will be used to prosecute and convict these victims? It is petitioners' position that the creation of crime is an insidious and immoral business and that the government has no place in it. For all of the reasons set forth below, granting of the writ requested is essential. The issues in this case, to quote from Judge Aldisert's incisive dissenting opinion below, raise questions which involve "an extremely sensitive intersection between morals and positive law, which demands that the judiciary assume rather than shirk responsibility." A. 79-80.

The Government's Conduct of ABSCAM Violated the Most Basic Standards of Due Process and Fundamental Fairness, Reaching and Exceeding That Degree of Outrageousness Which Mandates Dismissal of This Prosecution.

Given the extraordinary impact which ABSCAM has had on the national conscience, as well as the effect which any final decision on the ABSCAM affair will have upon the future conduct of law enforcement agencies in this country, it is submitted that the controversy which has swirled around ABSCAM must be definitively resolved. Indeed, so important is the resolution of these issues that they should not be left to piecemeal adjudication by the courts of appeals.

The District Court in this case applied the "demonstrable level of outrageousness" standard set down in *Hampton v. United States*, 425 U. S. 484, 495 n. 7 (1976) (Powell, J., concurring), and held that the government's conduct and activities in ABSCAM exceeded permissible limits. Petitioners submit that a review of this record will confirm that the District Court was correct.

Due process in the context of criminal proceedings has received only limited treatment by this Court,[6] but numerous courts of appeals have applied due process concepts[7] and in several instances, have reversed criminal convictions on this very ground.[8] Every factor found relevant to the due process analysis by every court of appeals that has considered the issue is present here in the extreme.

The government instigated, suggested, set in motion, and "scripted" the entire ABSCAM scheme. ABSCAM epitomizes extremely unfair governmental conduct at the

6. *Sorrells v. United States*, 287 U. S. 435, 459 (1932) (Roberts, J., separate opinion); *Sherman v. United States*, 356 U. S. 369, 381 (1958) (Frankfurter, J., concurring); *United States v. Russell*, 411 U. S. 423 (1973); *Hampton v. United States, supra; see Olmstead v. United States*, 277 U. S. 438, 485 (1928) (Brandeis, J., dissenting); *Casey v. United States*, 276 U. S. 413 (1928) (Brandeis, J., dissenting).

7. E.g., *United States v. Bocra*, 623 F. 2d 281 (3rd Cir.), *cert. denied*, 449 U. S. 875 (1980); *United States v. Prairie*, 572 F. 2d 1316 (9th Cir. 1978); *United States v. Johnson*, 565 F. 2d 179 (1st Cir. 1977), *cert. denied*, 434 U. S. 1075 (1978); *United States v. Leja*, 563 F. 2d 244 (6th Cir. 1977), *cert. denied*, 434 U. S. 1074 (1978); *United States v. Reifsteck*, 535 F. 2d 1030 (8th Cir. 1976), and see cases cited *infra* at footnote 8.

8. *E.g., United States v. Twigg*, 588 F. 2d 373 (3d Cir. 1978); *United States v. Archer*, 486 F. 2d 670 (2d Cir. 1973); *United States v. Russell*, 459 F. 2d 671 (9th Cir. 1972), *rev'd* 411 U. S. 423 (1973); *Greene v. United States*, 454 F. 2d 783 (9th Cir. 1971); *see United States v. West*, 511 F. 2d 1083 (3d Cir. 1975).

highest level. Governmental involvement in ABSCAM was pervasive and extended over the entire period of the scheme. The nature of that involvement was singularly and unfairly designed to lure innocent persons into its web. No evidence of ongoing criminal conduct by either petitioner was present when ABSCAM was injected into their lives, nor did any evidence exist of any prior or continuing criminal activities of this type in Philadelphia municipal government at the time the ABSCAM operation arrived.

Neither petitioner encouraged the government either to initiate or expand the scheme; each responded only to the government's inducements and protestations of need. No evidence of petitioners' predisposition, aside from some "puffing" in the course of the governmentally-scripted meetings, could be presented by the prosecution during trial. Extreme pressure was brought to bear on all persons involved in the Philadelphia ABSCAM operation through the offer of substantial sums of money, the use of the "Arab mind" ruse, and the government's appeal to petitioners' civic duty through representations that, unless money was accepted to evidence petitioners' friendship for the sheik, the hotel project would not be placed in Philadelphia. The government's agents employed middlemen who were paid on a contingent fee basis, a tactic condemned by the Fifth Circuit in *Williamson v. United States*, 311 F. 2d 441 (5th Cir. 1962), *on appeal after remand*, 340 F. 2d 612 (5th Cir.), *cert. denied*, 381 U. S. 950 (1965), and they were totally unconcerned with the methods and ploys used by these middlemen to convince persons to participate in the meetings, despite their knowledge of prior deception and unconscionable coaching by these very same middlemen. Finally, the government went to extraordinary lengths to create a climate of temptation which itself preyed upon the weakness of the victims of the scheme.

The government's conduct throughout ABSCAM was the antithesis of fair and effective law enforcement. Neither the government nor Criden had any reason to suspect either a propensity to engage in criminal conduct on the part of either petitioner or the presence of any ongoing criminal activity involving petitioners. Yet, the government directed Criden to inject himself into the petitioners' lives with the deliberate intent to lure them into criminal activity and with a conscious design to corrupt them. Regardless of petitioners' state of mind at the time they were approached by the government, no reason exists, on this record, even to suggest that, absent the government's instigation in this case, petitioners would not have lived the rest of their lives as law-abiding public officials and respected members of the community.

The Court of Appeals distorts the significance of the various aspects of the government's activities in ABSCAM by isolating them one from the other, and by failing to recognize that all of these elements, taken together, plainly demonstrate the outrageousness of the government's conduct. In *Greene v. United States, supra,* 454 F. 2d at 787, the Ninth Circuit recognized that although

> "taken individually, none of the factors which we have pointed to as significant would necessarily require reversal of a conviction. *In our view, it is the combination which is important.*" (Emphasis added).

The totality of factors present here mandates a ruling in petitioners' favor.

Further, in its analysis of the due process question, the Court of Appeals improperly mixes concepts of entrapment and due process, failing to recognize the constitutional underpinnings of the due process defense. For example, although proof that the government had no reason for approaching a victim may be irrelevant in the entrap-

ment context, A. 64, it is and must be a factor in any due process analysis. Similarly, although in the view of the Court of Appeals the inducements offered to petitioners by the government may not have been sufficient to sustain an entrapment defense, see A. 62, these same inducements may, when viewed in conjunction with the entire scope of unfair governmental activity, be a substantial factor in supporting a due process defense.

Even if one argues, as does the Third Circuit majority, that the government may employ secretive tactics and deliberate strategems to ferret out dishonesty among public officeholders or to detect illicit drug transactions, that fact does not sanction the government's instigation, control, and total orchestration of the very criminal activity which it intends to prosecute. In every other case in which the due process defense has been raised, governmental involvement in criminal activity has been passive and the basic criminal design has, in each instance, been conceived and carried out in all material respects by the defendants themselves. In none of those cases has governmental instigation of or involvement in criminal conduct risen to the levels which are present in the Philadelphia ABSCAM case.

Here, the government defined the nature of the scheme in an attempt to create the jurisdictional fact—interstate commerce—which would permit it to prosecute this case in the federal courts. In the same manner, the government, through its manipulation of its captive middleman, Criden, constructed a pattern of bribery which would not have existed but for Criden's presence throughout the scheme.[9] Further, the conduct and language of the gov-

9. The District Court found that the government, through the involvement of its own "agent," Criden, created, initiated, and instigated the pattern of bribery "as well as each bribe" upon which the RICO charge is premised, solely to satisfy the requirements of RICO and to permit the exercise of federal jurisdiction over fabri-

ernment's agents were deliberately ambiguous and misleading. Indeed, a review of the record will demonstrate that at no time did the government ever ask either petitioner whether the payment of bribes was necessary. Moreover, at no point did the government seek to elicit petitioners' understanding of the purpose of the meetings. One must conclude that the agents feared that an explicit approach would have resulted in the flight of their victims.

Finally, a review of the Circuit Court's opinion reveals an extraordinary misconception of the role of the judiciary in our society. In the view of a majority of the Third Circuit, it is *not* the judiciary's function to determine the constitutional limitations under which our law enforcement agencies are to operate. According to Judge Sloviter:

> ". . . the conduct of agents of the executive branch who must protect the public from crime is more appropriately considered through the political process where divergent views can be expressed in the ballot box." A. 66.

The opinion of the Court of Appeals manifests a total abnegation of the judiciary's obligation to define and enforce the rights of citizens under the Constitution. As Judge Aldisert recognizes in his dissent:

> [T]he philosophical difference that divides this court depends upon a judge's unspoken notions about the role of the courts. If he or she views the role of

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9. (Cont'd.)

cated state bribery charges. Reasoning from *United States v. Archer, supra*, Judge Fullam held that absent the government's injection of these elements into the scheme, no proof of a pattern of racketeering activity under 18 U. S. C. § 1962(c) could be shown, thereby requiring dismissal of the charges on the ground of manufactured jurisdiction. A. 175. The Court of Appeals never addressed this issue.

the court as a passive one, he or she will be willing to delegate the responsibility for unpopular issues to the jury and not care greatly what the result may be. If he or she views the court as an instrument of society designed to reflect in its decisions the highest values of the American legal tradition, he or she will be more likely to risk public disapproval and to measure an unpopular cause against the highest ideals and aspirations of the time.

"The rights conferred upon our society by judges of the Third Article emanated from cases in which the defendants were unpopular and generally regarded as transgressors—Dollree Mapp, Danny Escobedo, and Ernesto Miranda quickly come to mind. In each case, a court, not a jury, drew the line of demarcation between permissible and impermissible police conduct to insure that enforcers of society's laws would not violate established moral frontiers while exercising their stewardship; it was federal judges, unmindful of editorials and broadcast plaudits, who chose to stand tall and unbending." A. 80. (Footnote omitted).

If a national benchmark defining limits on law enforcement activity of this type is not established, no citizen is secure from the clandestine imposition of morality tests conceived and administered by the federal bureaucracy for purposes ranging from legitimate law enforcement to chilling political intimidation.

Where the Evidence of Governmental Inducement Is Overwhelming, the Government May Not Rely Upon Evidence of "Ready Acquiescence" Manufactured by It to Meet Its Burden, Nor Can a Court Sustain a Conviction in an Entrapment Case on Proof of Commission of the Criminal Act Alone.

Although recognizing that under the law of entrapment it is the government's burden to prove predisposition beyond a reasonable doubt, the Third Circuit proceeds to ignore this standard of proof, to impose upon a criminal defendant the obligation to prove lack of predisposition, and to permit the verdict below to stand on evidence of the commission of crime alone. If the Court of Appeals' ruling is not reversed, the entrapment defense will have been obliterated.

Predisposition involves a difficult inquiry into the defendant's subjective state of mind. "[T]he controlling question [is] whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Sorrells v. United States*, 287 U. S. 435, 451 (1932). Subsumed within any discussion of entrapment is the complex, intertwined relationship between inducement and predisposition. As the Third Circuit itself recognized in *United States v. Watson*, 489 F. 2d 504 (3d Cir. 1973):

> "[T]he stronger the inducement, the more likely that any resulting criminal conduct of the defendant was due to the inducement rather than to the defendant's own predisposition." *Id.* at 511.

The extraordinary degree of government inducement in this case has already been reviewed. Given evidence of these overwhelming inducements, the government's evidentiary burden to prove predisposition was substantial.

But the majority of the appellate court abjures any necessity to conduct a review of the entire record, despite its profession of the appropriateness of such a procedure. A. 41-42. Instead, as Judge Aldisert points out, it satisfies itself with a rebuttal of the items relied upon by the District Court in entering judgments of acquittal. A. 93. In so doing, the court again relieves the government of its obligation to prove predisposition by good and sufficient evidence and effectively shifts the burden of disproof onto the petitioners. Petitioners submit that a review of the record will plainly demonstrate that not a scintilla of evidence exists to establish the requisite predisposition, let alone to counterbalance the weight which must be accorded to the uncontradicted proof of massive government inducement.

Second, although appreciating that predisposition has been historically proven by, for example, proof of a defendant's prior convictions, his participation in similar transactions or proof of bad character, the Court of Appeals majority makes the startling observation that since "[s]uch evidence would be extremely difficult to produce in the case of acceptance of a bribe by a public official . . . . the very acceptance of a bribe by a public official may be evidence of a predisposition to do so when the opportunity is presented." A. 53-54.

Again, the majority of the court below states, in the most blatant terms, that proof of the criminal act, a fact which must be admitted of necessity by a criminal defendant if he is to be permitted to argue entrapment, is enough when it is a public official who is in the dock. No basis for the application of such a double standard exists in our law.

Further, even if one ignores the broad concept set down by the Court of Appeals that proof of the crime of extortion is sufficient to defeat the entrapment defense and

accepts that court's abstract proposition that the demeanor of the petitioners during the commission of the criminal act is sufficient proof upon which to premise a finding of predisposition, attention must be directed to the nature of that proof which was presented at trial.

In this case, the government created the scheme, sent out its agent, Criden, to recruit the victims of the scheme, enticed the petitioners to attend staged meetings, orchestrated and scripted every aspect of those meetings, and controlled the flow of conversation to the extent that the petitioners' statements were always made in response to continuously monitored specific inquiries of the government. The conduct and conversation of the government's agents at the meetings were admittedly designed for the sole purpose of obtaining evidence to be used in a future proceeding. Nevertheless, it is this very evidence and only this evidence—this demeanor of petitioners at the meetings—which the government now contends is sufficient to satisfy its burden of proof of predisposition.

No logic exists which would justify a finding that the government may mold and manufacture the "ready response" evidence and then would permit reliance upon this evidence as the sole proof of predisposition. In no case in which proof of government inducement was as overwhelming as this case has any court permitted a conviction to stand on the flimsy "ready acquiescence" evidence presented here. Although in some situations a defendant's ready acquiescence to the government's suggestions may be enough to justify a finding of predisposition, here neither petitioner said or did anything tending to establish pre-existing criminal inclinations, or exhibited such familiarity with criminal techniques and procedures as to demonstrate previous experience with similar criminal activity. In short, there was no evidence to show that when the government's overtures first came to the atten-

tion of Schwartz and Jannotti they were already predisposed to accepting bribes.

At bottom, it is clear that the court's rejection of the entrapment defense rests upon the simplistic notion that all petitioners had to do when offered the money was to say "No thanks." A. 58. Such an approach to the difficult jurisprudential problem raised by this case is wholly unacceptable. Peeling away the veneer of language in the court's opinion, one finds only the proposition that if petitioners are to be punished for their immorality, the defense of entrapment must be seriously compromised or, indeed, eradicated. Review by this Court of the critical entrapment issues raised by this case is essential.

The Third Circuit's Ruling on Hobbs Act Jurisdiction in This Case Conflicts With the Rulings of Three Courts of Appeals, Impacts on All Federal Criminal Legislation Enacted Under the Commerce Clause, Misapplies Prior Holdings of This Court, and Is Erroneous Under the Facts of This Case.

The interstate commerce requirement in the Hobbs Act, 18 U. S. C. § 1951, is a jurisdictional prerequisite to any prosecution under that Act. As this Court held in *United States v. Feola*, 420 U. S. 671, 695 (1975), in an analogous circumstance, "[t]he jurisdictional requirement is satisfied by the *existence of facts* tying the proscribed conduct to the area of federal concern delineated by the statute." (Emphasis added). In its decision below, the Court of Appeals completely disregards this fundamental concept, establishes a standard of proof which is in direct conflict with the standards employed by the Fourth, Seventh, and Ninth Circuits, sustains a conviction for Hobbs Act conspiracy where no jurisdictional fact was or could have been proven, misinterprets this Court's prior decisions in *Feola* and *Perez v. United States*, 402 U. S. 146

(1971), and demonstrates a basic misunderstanding of the jurisdictional limitations inherent in all federal legislation. For these reasons and because, as the Court of Appeals does recognize, a determination, in the Hobbs Act context, as to the extent of Congress' power under the commerce clause "will have ramifications for all federal criminal statutes enacted under Congress' commerce clause power," A. 26, review of the Hobbs Act issues raised herein is imperative.

First, in *United States v. Staszcuk*, 517 F. 2d 53 (7th Cir.) (en banc), *cert. denied*, 423 U. S. 837 (1975), Judge, now Justice, Stevens addressed the interstate commerce issue raised by the Hobbs Act, and held:

> "[T]he statutory language [of the Hobbs Act] . . . requires the prosecutor to prove some connection with interstate commerce in every case. We hold, however, that the commerce element of a Hobbs Act violation—*the federal jurisdictional fact*—may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce. . . . *[J]urisdiction in the particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce.*
>
> *"The jurisdictional inquiry must, of course, focus on the situation at the time of the offense."* *Id.* at 59-60. (Emphasis added) (Footnotes omitted).

Since 1975, the "realistic probability" test enunciated in *Staszcuk* has continued to be the law in the Seventh Circuit and has been adopted and uniformly applied by the Fourth and Ninth Circuits.[10]

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10. *E.g.*, *United States v. Rindone*, 631 F. 2d 491, 493 (7th Cir. 1980); *United States v. Phillips*, 577 F. 2d 495, 501 (9th Cir.), *cert. denied*, 439 U. S. 831 (1978); *United States v. Spagnolo*, 546 F. 2d 1117, 1119 (4th Cir. 1976) (per curiam), *cert. denied*, 433 U. S.

In this case, the government-created scheme upon which the ABSCAM operation was premised was wholly fictitious. Accordingly, the government could not and did not prove at trial that, had the scheme been carried out, commerce would have been affected.[11] Likewise, since the government, through its agents, never had any intention to implement the scheme, there never existed any possibility that the charged conspiracy would ever have any effect upon interstate commerce. Despite these undisputed facts, the Third Circuit held that where a defendant's conduct constitutes "a sufficient threat to interstate commerce so as to implicate an 'area of federal concern'," federal jurisdiction is established. Thus, in direct conflict with *Staszcuk*, the Third Circuit has wrongly substituted a wholly subjective test, which would rest federal jurisdiction upon hypothetical, imaginary or non-existent effects on commerce.

Under the rationale of *Feola*, jurisdiction must be predicated upon facts. In *Feola*, the jurisdictional nexus under 18 U. S. C. § 111 is satisfied by the existence of a ***fact***, the presence of a federal officer, just as jurisdiction under the Hobbs Act is based upon the existence of a fact—an effect on interstate commerce. If A and B conspire to assault X and X turns out to be a federal officer, the federal jurisdictional fact, and in turn federal jurisdic-

10. (Cont'd.)

909 (1977). Numerous other Courts of Appeals have referenced the *Staszcuk* formulation in passing on Hobbs Act jurisdiction issues, including the Third Circuit itself. *E.g., United States v. Cerilli*, 603 F. 2d 415, 424 (3d Cir. 1979), *cert. denied*, 444 U. S. 1043 (1980).

11. It is undisputed that no evidence, of any nature, was introduced at trial by the government to show that the alleged conspiracy would have had *any* effect, actual or potential, on commerce if performed. A. 130.

tion, is present. However, if A and B conspire to assault X who they *mistakenly* believe to be a federal officer, the federal jurisdictional fact is not present. Likewise, if a federal agent *tells* A and B that X, a federal officer, will be arriving to arrest them, and A and B agree to assault X upon his arrival, but X is a creation of the federal agent's imagination, just as was the hotel project in ABSCAM, there can be no federal jurisdiction.

Federal jurisdiction is not predicated solely upon the state of mind of the defendants. Fictions cannot replace jurisdictional facts. In this case, measured by the *facts*, no effect on commerce could ever take place.

Second, permeating every aspect of this case is the uncontroverted fact that the federal government instigated, scripted, and implemented ABSCAM. The federal agents thus unilaterally fashioned a scheme which they hoped would satisfy jurisdictional requirements. In each case relied upon by the Court of Appeals, however, the nature and extent of the conspiracy—the substance of the criminal design—was formulated by the defendants themselves.[12]

If the focus of the jurisdictional inquiry is upon the conspiratorial agreement, *see United States v. Feola*, *supra*, 420 U. S. at 695-96, it is both illogical and patently unfair to sanction governmental manipulation of that agreement solely to create federal jurisdiction. If the purpose of the *federal* conspiracy laws is to provide federal law enforcement officials with the tools necessary to combat criminal conduct in "areas of federal concern," it is likewise illogical to contend that these same officials may unilaterally create an "area of federal concern" in any given case so that they may prosecute it.

12. See cases cited in the opinion of the Court of Appeals at A. 28-31.

Whether one accepts Judge Aldisert's formulation that "A purely hypothetical effect, a fairy tale conjured by the FBI . . . is not 'a sufficient threat to [commerce] so as to give rise to federal jurisdiction,'" or one employs Judge Friendly's "manufactured jurisdiction" approach, *United States v. Archer, supra,* 486 F. 2d at 682, the reality is that no real, actual impact on commerce could have ever occurred in this case and but for the government's creation and injection of an interstate element into the scheme, the federal courts would be without jurisdiction to prosecute petitioners under the Hobbs Act. This case, even more than *Archer*, epitomizes the concept of "manufactured federal jurisdiction." [13]

Third, not only does the opinion of the Court of Appeals demonstrate a complete misunderstanding of *Feola, see* 420 U. S. at 695-96,[14] which clearly states that a federal officer *must* be the subject of an agreement to assault if federal jurisdiction is to be present, but it also reflects a fundamental misperception of and a lack of respect for the essential nature of federal criminal jurisdiction. As Judge Aldisert recognizes:

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13. In its Opinion, the District Court stated:

"Moreover, to permit this kind of artificial federalization *would effectively remove virtually all of the limitations upon the criminal jurisdiction of federal courts, and would be utterly contrary to accepted notions of federalism.*" A. 153-54 (Emphasis added).

14. In her Opinion, Judge Sloviter remarks:

"In holding [in *Feola*] that there was a 'sufficient threat' to an 'area of federal concern' to meet the jurisdictional requirements as long as a federal officer was in fact the target of the planned attack, 420 U. S. at 695, *the Court did not preclude the existence of federal jurisdiction where the intended victim is believed to be a federal officer, but in fact is not.*" A. 32. (Emphasis added).

> "The majority interweaves its jurisdictional argument with the argument that factual impossibility of completing a substantive offense does not bar a conviction of conspiracy. *They confuse proof of the crime of conspiracy with the jurisdictional power to punish the crime.* The presence of subject matter jurisdiction is a discrete and primary issue in each case presented to a federal court, unlike a state court. The effect on commerce is both jurisdictional and substantive in a Hobbs Act prosecution, but the two inquiries are separate and distinct. *See, e.g., Feola,* 420 U. S. at 694-96." A. 101. (Emphasis added).

Not only are the two inquiries "separate and distinct," but also the standards by which they are determined differ. Respecting proof of the substantive offense, the subjective criminal intent of an alleged Hobbs Act defendant is crucial; respecting proof of Hobbs Act *jurisdiction,* however, the subjective criminal intent of a Hobbs Act defendant is irrelevant. The intent of the Hobbs Act defendant can neither create nor negate the jurisdictional fact. In *Staszcuk,* Judge Stevens understood this distinction and formulated a test which respected it. Judge Sloviter, in her opinion for the court below, paid lip service to the limitations inherent in the Constitution's grant of power to Congress to legislate under the commerce clause and established a test which shifts the focus of the jurisdictional inquiry away from the "existence of [real] facts" and to the subjective intent of the actor. As a result, the objective "realistic probability" test established by *Staszcuk* has been disembowled by the Third Circuit and the requirement in *Feola* that jurisdiction be predicated on fact has been eliminated.

Finally, the Court of Appeals faults the petitioners for failing to present any "policy reason" for it to accept

"their restrictive view" of the jurisdictional reach of the Hobbs Act. A. 32. But the policy is clear. The federal courts are a creation of the Constitution and of Acts of Congress, and, as such, they are courts of limited jurisdiction. Jurisdiction under the Hobbs Act is predicated on the commerce clause. Interference with commerce must be proven before the federal courts may prosecute a violation of the Hobbs Act. Absent actual interference with commerce or clear proof that an actual impact on commerce would have resulted from a criminal defendant's actions, the federal courts cannot hear the case. It is petitioners' position that the Court of Appeals, by its ruling, has abolished all jurisdictional limitations which heretofore existed under the Hobbs Act and has constructed a standard "which in practicality would extend federal jurisdiction over just about any robbery or extortion." *United States v. French*, 628 F. 2d 1069, 1077 (8th Cir.), *cert. denied*, 101 S. Ct. 364 (1980).

A Conviction for Extortion Under the Hobbs Act Absent Proof of Inductment by a Defendant Should Not Be Permitted, and Clarification of This Issue Is Essential.

A plain reading of the definition of "extortion" in the Hobbs Act shows that proof of inducement is necessary to convict. The District Court held that the absence of proof of any express or implied demand or request for payment by petitioners requires dismissal of the Hobbs Act charges. A. 110. The Court of Appeals reversed, asserting that the law is clear throughout the circuits that proof of inducement by a public official acting "under color of official right" is unnecessary. A. 33. Petitioners submit that both the decision of the Court of Appeals and its rationale are incorrect.

The First, Third, and Eighth Circuits have each approved jury instructions which require a specific finding

of inducement.[15] In fact, except for *Staszcuk*, where insufficient detail is provided to determine whether affirmative action was taken by the defendant, and *United States v. Hedman*, 630 F. 2d 1184 (7th Cir. 1980), *cert. denied*, 450 U. S. 965 (1981), which does nothing more than cite, as "settled law," the very cases which either include evidence of inducement or approve a charge on inducement, there is no decision under the Hobbs Act involving a public official which sustains an extortion conviction absent evidence of inducements, or of "initiative and purpose," *United States v. Hyde*, 448 F. 2d 815, 833 (5th Cir. 1971) (Wisdom, J.), *cert. denied*, 404 U. S. 1058 (1972), on the part of the official.[16]

In this case, it is clear that neither of the petitioners nor anyone acting on their behalf, at any time, requested or demanded money in connection with the proposed construction of the hotel in Philadelphia or in exchange for petitioners' use of their official positions. Rather, the evidence is clear that petitioners were, at most, the passive recipients of money and would have supported the proposed project whether or not any money was paid to them.

In those cases decided under the Hobbs Act in which public officials were not defendants, the law has long been clear that, in the absence of proof that defendants induced or intended to induce payment, the mere acceptance of a bribe does not constitute extortion or violate

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15. *See United States v. Hathaway*, 534 F. 2d 386 (1st Cir.), *cert. denied*, 429 U. S. 819 (1976); *United States v. Addonizio*, 451 F. 2d 49, 59 (3d Cir.), *cert. denied*, 405 U. S. 936 (1972); *United States v. Adcock*, 558 F. 2d 397 (8th Cir.), *cert. denied*, 434 U. S. 921 (1977).

16. "In other words, while the essence of bribery is voluntariness, the essence of extortion is duress." *United States v. Addonizio, supra*, 451 F. 2d at 72, citing *People v. Dioguardi*, 8 N. Y. 2d 260, 203 N. Y. S. 2d 870, 168 N. E. 2d 683 (1960).

the Hobbs Act. *E.g., United States v. Gerald,* 624 F. 2d 1291 (5th Cir. 1980), *United States v. Duhon,* 565 F. 2d 345 (5th Cir.), *cert. denied,* 435 U. S. 952 (1978), *United States v. Hyde, supra.*[17] And, as noted above, given the requirement of inducement even in official corruption cases and the fact that no case involving official corruption has ever resulted in conviction of the defendant absent proof of a request or demand, the Court of Appeals' reading of the Hobbs Act statute and the conclusion which it reached are clearly incorrect. Clarification of this troublesome issue is plainly warranted.

17. Indeed, no rational argument can be made to support divergent approaches to the Hobbs Act. As the court stated in *Hyde,* "[t]he distinction from bribery is therefore the initiative and purpose on the part of the [defendant] and the fear and lack of voluntariness on the part of the victim." *Id.* at 833.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

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Appendix

Supreme Court, U.S.
FILED
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81-1899

No.

IN THE

Supreme Court of the United States

October Term, 1981

HARRY P. JANNOTTI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

GEORGE X. SCHWARTZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

JOINT APPENDIX OF PETITIONERS JANNOTTI AND SCHWARTZ

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1020 and 81-1021

UNITED STATES OF AMERICA
Appellant in No. 81-1020

v.

JANNOTTI, HARRY P.

(D.C. Crim. No. 80-00166-02)

UNITED STATES OF AMERICA,
Appellant in No. 81-1021

v.

SCHWARTZ, GEORGE X.

(D.C. Crim. No. 80-00166-04)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 10, 1981

Before: ALDISERT, WEIS, and SLOVITER, *Circuit Judges*

Reargued In Banc November 23, 1981

Before: SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS,
GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

(Opinion filed February 11, 1982)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

On September 16, 1980, after a six-day trial, a jury found defendants Harry P. Jannotti and George X. Schwartz guilty of conspiring to obstruct interstate commerce, in violation of the Hobbs Act, 18 U.S.C. §1951(a), and found Schwartz guilty of conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962(d). At the time of the events charged in the indictment, Schwartz was president of the Philadelphia City Council and Jannotti was the Council's majority leader. Following the entry of the guilty verdicts, defendants renewed their requests for judgments of acquittal and dismissal of the indictment, on which the trial court had previously reserved decision. On November 26, 1980, the district court entered an order setting aside the verdict of the jury in its entirety, dismissing Count III of the indictment (the Hobbs Act count) for lack of jurisdiction, and granting the motions of defendants for judgment of acquittal. The Government appeals.[1]

In his opinion accompanying the order, the trial judge gave four reasons for entry of the judgment of acquittal and dismissal of Count III of the indictment. *United States v. Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1980). He concluded:

---

1. The government suggests that we have jurisdiction under 28 U.S.C. §1291. That section does not create appellate jurisdiction over appeals by the United States in criminal cases. DiBella v. United States, 369 U.S. 121, 130 (1962); Government of the Virgin Islands v. Hamilton, 475 F.2d 529 (3d Cir. 1973). However, we have jurisdiction over these appeals pursuant to the Criminal Appeals Act, 18 U.S.C. §3731. *See* United States v. Wilson, 420 U.S. 332 (1975); United States v. Schoenhut, 576 F.2d 1010, 1018 & n.7 (3d Cir.), *cert. denied*, 439 U.S. 964 (1978).

1. The evidence at trial did not establish the actual or potential impact upon interstate commerce necessary to sustain federal jurisdiction under the Hobbs Act;

2. The evidence at trial established entrapment as a matter of law;

3. Governmental overreaching amounted to a violation of due process of law;

4. The circumstances relied upon to establish federal jurisdiction were artificially created. *Id.* at 1205.

Our review of the record and applicable law convinces us that in reaching these conclusions the district court erred in its legal analysis and usurped the function of the jury to decide contested issues of fact. We reverse the district court's order and direct reinstatement of the jury's verdict.

I.

SUMMARY OF EVIDENCE

An understanding and appreciation of the evidence presented to the jury is essential to consideration of the issues facing us on this appeal. We have therefore undertaken an exposition of some of the highlights of that evidence. The government operation, which has come to be known as ABSCAM, began some time in 1978. The basic nature of the plan was that F.B.I. agents posed as employees of Abdul Enterprises, a fictional multinational corporation whose principal, a fictional Arab Sheik, Yassir Habib of the Arab nation of Abu Dhabi, was represented as interested in investing large amounts of money in this country and in emigrating here. According to the government, the plan was "conceived to create opportunities for illicit conduct by public officials predisposed to political corruption." Brief for Appellant at 6. From the very beginning the government utilized the services of Melvin Weinberg, accurately characterized by the district court as a "career swindler,"

501 F. Supp. at 1193,[2] who, with F.B.I. agents, "spread the word" that the Sheik was interested in meeting public officials who could facilitate his planned investments.

This basic plan evolved into various subparts, each with its own cast of participants, which were ultimately the subject of a series of indictments returned by grand juries sitting in various federal districts of the country. Thereafter, a number of local and federal public officials were tried on offenses arising out of their participation. We focus on the facts material to the prosecution of Jannotti and Schwartz in the Eastern District of Pennsylvania.[3]

The Philadelphia phase began on January 11, 1980 when Weinberg called Howard Criden, a Philadelphia attorney, and told him that the Sheik was "looking to build a hotel" in Philadelphia. Criden, who had previously received money from the F.B.I. agents for arranging introductions to congressmen in connection with another phase of the ABSCAM operation,[4] was told that

---

2. Weinberg was convicted of mail fraud and wire fraud in 1977. At the intercession of the government, he was sentenced to three years probation in return for his agreement to help in the ABSCAM investigation. He was paid $3,000 a month by the F.B.I. as of the time of the trial, had received a total of approximately $140,000 up to that time, and had also received other fringe benefits.

3. The trials of two other defendants, Louis C. Johanson, a member of Philadelphia City Council, and Howard L. Criden, a Philadelphia attorney, who were indicted along with Schwartz and Jannotti were severed from that of Schwartz and Jannotti. Both Johanson and Criden were convicted on similar charges in the United States District Court for the Eastern District of New York, and the government moved for their dismissal as defendants here.

4. Criden, Johanson, and Mayor Errichetti of Camden, New Jersey, were instrumental in arranging for four congressmen, including Philadelphia Congressmen Myers and Lederer, to meet the F.B.I. agents. At the meetings the congressmen agreed to introduce immigration bills in return for money, leading to their ultimate indictment and conviction.

two representatives of the Sheik would be coming to Philadelphia to begin discussions. Weinberg suggested that they be introduced to Congressman Myers or Lederer, and asked Criden which one would be better.

> CRIDEN: Well, I got to hear what you want to do first, and . . . you know.
>
> WEINBERG: I think they're looking to build a hotel there. I'm not sure. That's only what I heard.
>
> CRIDEN: Okay. Why don't you tell him to find out more particulars because I don't know that either one would help you in that department. We may be able to give you more help to them.
>
> WEINBERG: Who do you know there?
>
> CRIDEN: Everybody!
>
> WEINBERG: Everybody?
>
> CRIDEN: Everybody!
>
> WEINBERG: All right. I'll . . . I'll.
>
> CRIDEN: Remember. I got a partner who's a city councilman.

A211-12.

A week later, on January 18, 1980, Criden met with F.B.I. agents Michael Wald and Ernest Haridopolos at the Barclay Hotel in Philadelphia. Wald and Haridopolos used the names Michael Cohen and Ernie Polos in their dealings with defendants throughout these events. That meeting was among the group of meetings at the Barclay recorded on videotape by the F.B.I. Wald told Criden that the Sheik was interested in building a hotel in South Philadelphia, that Wald's role was to address himself to possible problems such as zoning, condemnations, and variances. A351. Criden stated, "You don't have any problem. You got you two of the strongest guys" [referring to Myers and Lederer]. Wald responded, "He [Sheik] wants to be assured that municipal government and he can coexist." Criden asked, "How do you want me to satisfy you," to which Wald responded, "I'm sure the easiest way for me to deal with someone in mu-

nicipal government and I can go back . . . Titles impress the man, as you know, from past experience . . . . If he receives those assurances from someone with a title sounds appropriate, eh, I buy it, he buys it." A351-53.

Wald asked Criden about the municipal setup, including city council. Criden explained that Philadelphia City Council is composed of 12 district councilmen and five at-large councilmen, that his "partner [Johanson is] a district councilman", and that the president of city council, Schwartz, "is a powerful guy" who had been "president of city council for maybe now ten, twelve years, already now. Has got power." Wald responded, "He's the man." A354-55. Wald later asked:

> WALD: Can we deal with Mr. Schwartz.
> CRIDEN: Oh, sure.
> WALD: He seems like the type of person we . . .
> CRIDEN: Oh, sure.
> WALD: Can I deal with him while I'm here in town?
> CRIDEN: I don't know. I gotta get hold of my partner.
> WALD: Can I deal with your partner?
> CRIDEN: Oh, sure.

A357. After some discussion of timing and the proper "tariff," Wald asked if he could talk candidly with Johanson. Criden responded that "As far as Johanson is concerned, you can talk as candidly as you want." With regard to Schwartz, he stated, "He may want to handle it indirectly." A367. Wald expressed some concern, stating that under no circumstances would he want to disappoint his employer.

> CRIDEN: Listen, Mike, I, I read you loud and clear and if I was sitting in that chair, I would feel exactly the same way ok. You have no problems with me.

WALD: Ok. How do you want to work this? Eh, do you wantta call me back here concerning . . .

CRIDEN: Oh sure.

WALD: Mr. Johanson.

CRIDEN: I'll get back to you in the next couple hours.

WALD: Alright.

CRIDEN: If I can serve him up.

A368-69. Wald then asked what the "tariff" would be for Johanson and Schwartz, and Criden replied "[t]wenty-five" for Johanson, A375, and "[a]nother fifty" for Schwartz. A376. Wald demurred at the latter figure, and Criden asked, "You wanta go thirty on this guy?" Wald asked, "will he bite at thirty? . . . I mean does that take care of him?" and Criden replied, "Let me try it . . . . I'll run it up the flagpole." A376-77. Finally Criden raised the subject of his fee and asked for and was promised "ten for both of them." A377.

Several hours later, Criden returned with Johanson to the Barclay suite where Wald and Haridopolos waited. Wald again discussed the proposed hotel construction, explained that he wanted to avoid delays due to the need for a variance or a building permit, and received Johanson's assurances that the inspectors from Licenses and Inspections, the building inspectors, the plumbing inspectors, and the electrical inspectors are "not gonna monkey with you, for a minute because they're gonna be told not to . . . because the words gonna come down, that this is a vital project." A421. In discussing the political situation in Philadelphia, and City Council in particular, Johanson boasted that of the 17 councilmen, he and Schwartz was each a "very bright fella", and "after that there ain't a brain in the closet." A415. He spoke of his and Schwartz' importance, and stated that Schwartz, Jannotti and he "run the City Council." A450. Wald then asked about Jannotti:

WALD: Would he be interested in doing business with us.

JOHANSON: I don't know that it's necessary but if you want to we can.

WALD: I don't know — if it is -- you're the best judge of that.

JOHANSON: I think George is ah —

CRIDEN: Well, it might not be a bad idea to bring Harry up.

JOHANSON: We can bring Harry up. Harry's the Majority Leader. He's the — ya know, second in command.

WALD: Yea.

JOHANSON: He's got seniority.

A453-54. After some additional discussion, the following exchange took place:

HARIDOPOLOS: Are you acquainted with how much ah, ya know, ah for the favor and for all these assur — assurances, right.

CRIDEN: Right.

HARIDOPOLOS: You know how much it is?

JOHANSON: Sure.

HARIDOPOLOS: How much is it?

JOHANSON: Twenty-five.

HARIDOPOLOS: Okay, ah but, of course, ah, we have to have these proper assurances. You do us a favor, we're doin you a favor.

CRIDEN: Obviously.

JOHANSON: Sure.

A471. Johanson gave his assurances and received $25,000. A480. The following exchange took place:

WALD: And for 25 we've got a friend.

JOHANSON: Right.

A477. The conversation turned to Schwartz:

WALD: Can I talk to Mr. Schwartz as I have spoken —

JOHANSON: Next week —
WALD: — to you gentlemen —
. . .
WALD: [F]rankly . . .
. . .
CRIDEN: If you can't have the same discussion with George, . . . you won't have the meeting.

A485. Wald asked the same question about Jannotti. Criden promised to let him know whether he could have the same kind of conversation with Jannotti. A490. After Johanson left, Haridopolos gave Criden $5,000 and promised another "five for the next delivery." A501.

Criden, who did not know Schwartz personally, arranged for Schwartz to meet the F.B.I. agents through an intermediary, Judge Thomas Shiomos of the Court of Common Pleas of Philadelphia County, who lived in the same apartment hotel as Schwartz. Shiomos testified at trial that at a meeting on January 21, 1980 between him, Criden and their mutual friend, Mr. Kattleman, Criden told him of the proposed hotel construction, asked him if Schwartz would be interested in talking to "these people . . . for the purpose of giving them his advice with regard to building this complex in Philadelphia," and indicated that the investors were willing to "pay for [Schwartz'] advice." A639-40. Shiomos thereafter met with Schwartz, advised him that Criden had wealthy Arab clients who wanted to invest $150 million to build a hotel in Philadelphia, and indicated to Schwartz that Criden had said there "would be a fee for Mr. Schwartz for his advice" and "that Mr. Criden expected part of that fee." A643. Schwartz stated that he "would be interested in anyone who is willing to invest $150 million." Shiomos stated when he left that he didn't think there was anything "improper" but that if Schwartz "thought there was anything improper or fishy [Shiomos was] sure if [Schwartz] met with Mr. Criden that [Schwartz]

could determine that." A644.[5] Thereafter Criden spoke with Schwartz. That discussion was not taped or recorded, and there was no trial evidence as to the contents of the conversation.[6]

On January 23, 1980, Criden and Schwartz visited Wald at the Barclay suite. This conversation was videotaped. Criden stated that he and Schwartz had "spoken at length" and that Schwartz knew that those persons whom Wald represented were "interested in building a hotel facility in Philadelphia that may amount to some 30 or 40 million dollars." A689. Wald explained his purpose:

> WALD: Well, what I have been instructed to do and the purpose for ah my visits to to Philadel-

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5. Some time after Schwartz attended the January 23, 1980 meeting at the Barclay, Shiomos and Kattleman went to Kattleman's apartment where Criden lay $6,000 on the table as the fee to be paid to Shiomos and Kattleman. Shiomos assumed this was a portion of Criden's share of the fee that was paid to Schwartz. A654. Shiomos testified he gave his $3,000 share to Kattleman. A655.

6. In his post-trial testimony, Criden testified:

> Q. All right, now, when you went and saw Mr. Schwartz after Judge Shiomos had arranged for the interview, did you tell Mr. Schwartz that the purpose for Mr. Schwartz going there is to be a consultant for these Arabs or the Arab representatives?
>
> A. To some degree, yes.
>
> Q. You say to some degree —
>
> A. I told Mr. Schwartz there would be a consulting fee involved and I explained the project to him and I also told Mr. Schwartz that I had represented these people and had done business with them for some period of time and that he would receive a consulting fee.
>
> Q. Did you tell Mr. Schwartz at any time prior to his going to that meeting that the purpose of the meeting was in a sense to fix him and to arrange for him to take care of matters in front of City Council?
>
> A. No, sir.

A3317.

phia is to firm up uh, what we consider to be a major investment here and uh the gentleman cares to make a major investment here because he seems to like Philadelphia, and he has been told that it would uh be in his best interest to have an investment, uh, in an area where he, uh, would like to take up rather permanent residence and Philadelphia is it.

SCHWARTZ: Philadelphia is a nice city. Philadelphia has been on the move since 1952. And, uh, business climate in Philadelphia is good.

A690. Wald continued:

WALD: Uh, and we want to put one up. Now we know that there are problems inherent in any major construction, uh, in this city and any other city. What I am trying to do is take care of any potential problems long before they exist. We're not breaking ground tomorrow morning. We can forsee certain problems such as, uh, uh, zoning and variances and this type of thing . . . municipal government, how it effects those various things, but we don't want to be faced with problems down the road.

A691-92. Schwartz responded to this overture with a soliloquy on his own political power and importance. After explaining how close he was to the mayor[7] and that he was "sort of a protege" of the mayor's deceased father, who had been Chairman of the [Democratic] party, Schwartz stated:

SCHWARTZ: . . . Unfortunately then he died in '63. And I have been close to every chairman since. I am a member of the Democratic National Committee. I am a member of the State Committee.

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7. There is no evidence that William Green, Philadelphia's then newly elected mayor, was ever involved in or knew of the transactions at issue. In fact, Criden described Green as "an All American boy", A343, and advised Wald that it would be "a critical mistake" to approach him. A372.

I am a member of the City Committee. A Ward Leader. I, uh, I have a ward — if you know what that means in politics.

A693. A few minutes later, Wald asked:

WALD: Is it fair to say that by doing business with you, uh . . . my zoning problems become . . .

SCHWARTZ: Right.

CRIDEN: You, you don't have any.

WALD: Okay. Now. There are what, 17 members, as, as you say . . . and also what uh I read here . . .

SCHWARTZ: Right.

WALD: Uh, do we have a uh controlling vote . . .

SCHWARTZ: Yes.

WALD: . . . problem here?

SCHWARTZ: No . . .

WALD: Uh.

SCHWARTZ: No.

WALD: Can you control . . .

. . . .

WALD: . . . those types of factions?

SCHWARTZ: Yes.

WALD: You can control them?

. . . .

SCHWARTZ: The proof was today. The proof was the election of myself as president again.

WALD: Uh hmm.

SCHWARTZ: In other words, we got uh five or six now [sic] members that came in. Uh, you tell me your birth date. I'll give them to you for your birthday.

A695-6. The essence of Schwartz' representations of control was repeated shortly thereafter:

WALD: All right. You're controlling the council at this point.

SCHWARTZ: Right.
WALD: As far as I'm concerned.
SCHWARTZ: Right.
CRIDEN: Right. And has been for . . .
SCHWARTZ: Right. Right.
WALD: Should we have anything that comes up to a vote, that has to be done on a vote basis, the council is with you.
SCHWARTZ: Yes.
WALD: You control them at this point.
SCHWARTZ: Yes. Yes. Yes.
CRIDEN: 100 percent.
SCHWARTZ: Yes.

A709. Schwartz stated that although he could not promise that the hotel project would not have problems, those problems would not be "insurmountable" as long as the project "is a proper project." A698. Wald stated, "I am not putting up a cathouse", Criden interjected, "It's going to be legitimate", and Schwartz responded, "That I take for granted, or I wouldn't be here." A710. Wald then asked Schwartz for assurances of his support if the project "violates some minor . . . type statute or ordinance or . . . something", and Schwartz replied:

SCHWARTZ: There is a Board of Building Standards. There, there is built-in relief every stage of the way. There's a Zoning Board of Adjustment for variances.
WALD: Okay. Can you control that?
SCHWARTZ: Yes . . . .

A711. Immediately thereafter he explained, "if it isn't something that is outlandish, if it is something that should and can be handled, and I can, I can't think of anything that couldn't be handled . . . [t]hrough a variance procedure of some kind." A712. Wald stated:

WALD: Okay. Meaning that, if City Council has to vote on it, we don't have a problem at this point?

SCHWARTZ: Well, I'm going further. There are other boards and agencies, uh, depending upon what your client, how idiosyncrant he wants to be and how eccentric he wants to be.

WALD: (Laughter) . . . They can become rather eccentric.

SCHWARTZ: All right. All right. It may be necessary to go to these various boards and commissions. Now, they are part of the organization. They are part and parcel and . . .

WALD: Appointed, appointed officials?

SCHWARTZ: Yes, they are appointed officials. Uh, but uh, as I say, uh, I always do my homework. And, uh, the mayor is a very strong mayor. We have a strong mayor form of government. And all these people are his appointees. My understanding with him is that I go to him — period. I don't even have to go to one of the flunkies, one of the functionaries. I go to him . . . .

A712-13. After additional discussion which concerned local law firms that could be employed by the hotel project, the economic climate in Philadelphia, and the encouragement received by business from the city, Wald referred to Schwartz' compensation:

WALD: Our time frame is growing short, but we don't have those type of problems. We don't have that built-in resentment. Ah . . . We've talked to Howard, you know, the figures, the dollars we're talking are in the right ballpark. We're . . .

SCHWARTZ: That's not my prime concern. I'm interested in the City of Philadelphia. I'm interested in a good project. I'm interested in tax rateables. I want to see Center City develop. Especially Center City. There are a few parcels left. Well anything else that's going to add to the tax rateables of the city that's going to create jobs.

WALD: I am again quick to say that I'm not really interested in the City of Philadelphia to be candid.

SCHWARTZ: Well I have to be. I have to be.

WALD: Perhaps, oh sure . . . (inaudible) . . .

CRIDEN: Your primary concern is to see that if your employer decides to move, you have a minimum amount of problems.

WALD: Exactly . . . . Problems are to be handled before they arise. Right. Should any minor problems come up. Should any problems that are councilmatic in scope . . .

SCHWARTZ: No problem.

WALD: You could take care of them. Those are the type of things . . .

SCHWARTZ: Right.

WALD: That he asks I make an unequivocal, yes, it's been handled, it's been taken care of and uh . . .

CRIDEN: You make that an unequivocable yes.

SCHWARTZ: It's . . . I would say to you that it's much easier now than it is than it was four years ago.

A746-47. The conversation returned to the nature of the understanding:

SCHWARTZ: There are administrative escape hatches for everything in the City of Philadelphia under our various codes. There's a way of doing it — administrative way of doing it.

WALD: Okay, and that is the type of thing you can handle for us.

SCHWARTZ: Oh yeah, right.

WALD: I can go back and say I met a gentleman. We had a business deal uh, I've made a friend in Philadelphia.

SCHWARTZ: Yes.

. . . .

WALD: And things are taken care of . . .

SCHWARTZ: Right . . .

WALD: Okay, and the sums appropriate and we're in good shape. Okay.

A753-54.

Shortly thereafter as seen on the videotape, Wald opened his briefcase and, without discussion of the amount, handed Schwartz an envelope [containing $30,000 cash], which Schwartz placed in his jacket without counting. The nature of the commitment Schwartz made was reiterated:

WALD: The legislative problems we've taken care of?

CRIDEN: No problem.

WALD: Okay, that I can, that I, that I got assurance on.

SCHWARTZ: Right.

CRIDEN: You have, you have no problem.

WALD: Okay, the other things can be done through attorneys, but the legislative problems don't exist anymore?

CRIDEN: That's right.

SCHWARTZ: No. Do not.

WALD: Okay.

A756.

Criden remained behind and received his $5,000 fee for arranging the meeting. A758. He admitted to Wald that he had to give "something" to someone to make the approach to Schwartz. A763. Wald indicated an interest in talking to Jannotti if he was "amenable" because both Criden and Johanson had referred to Jannotti "as a power." A770. Criden undertook to ascertain to "try to do something" with Jannotti and "if the answer is no, I'm going to tell you right off the bat, forget it." A778. They discussed the amount of the payment to

Jannotti, Wald asking "Will he run with five" and Criden replying "Maybe ten . . . [L]et me run it up the flag pole with him." A779-80. Wald asked whether he should deal with anybody else on the executive side and was told that there was no one else he could or should do business with. Criden promised to communicate with Wald the next day and departed.

The next evening, January 24, 1980, following telephone arrangements, Jannotti and Criden arrived at the Barclay suite to meet with Wald and Haridopolos. Jannotti had been briefed by Criden and Schwartz earlier that day who had "explained the whole situation." A848. With Jannotti, as with Schwartz, Wald explained "I'm only here for one reason, to bring back some assurances." A849. He continued:

> WALD: [W]e are prepared to make a major investment in this city, alright, and, ah, we have incredible funding but it's still a major investment even for the people that I represent at this time. Ah, it's not a drop in the bucket even for them. It's a fair amount of money and ah, the way these people do business, is somewhat different than the way we do business in this country, they don't think. They just can't tolerate nor can they put up with psychologically any problems that arise. Now these type of problems do arise but they can be handled, but the type of problems that would get back to my employer. Ahe, he can't deal with them, and he turns to me and says I thought we had all this settled in Philadelphia. So, that's why I'm here, simply to take care of any problems now.
>
> JANNOTTI: Far in advance.
>
> WALD: Ah, it's really not that far I don't think.
>
> CRIDEN: Well . . .
>
> WALD: But at least enough in advance that ah when the time comes it's over and done with everything is nice. Ah, those problems are simply the

ones that I can forsee and you haven't come up with anymore than you and I had been worried about nor has the other gentleman I dealt with, and that would be ah, ah, the zoning, any variances that we have to obtain any, ah, committee type things we'd would have to, ah, deal with, with City Council ah, inspections, licensing the whole gamut, ya know the whole thing, well you were in that type of business in, in an allied situation and I'm sure you can appreciate the petty things that arise, ah, that have to be handled.

JANNOTTI: First of all you, you're going to invest a substantial amount of money and, ah, what you'll be doing is bringing into the City of Philadelphia a substantial amount of money, and this will create jobs, will create a tax base and ah from what I gather everything that you want to do with be strictly, ah, on board. I mean there's nothing phony about it.

WALD: It's a legitimate operation.

JANNOTTI: As long as it's, long as it's a legitimate, legitimate operation. Ya know, any legitimate operation we will fight for because, ah, ya know why shouldn't we fight for a legitimate operation? If the operation is legitimate, it's going to bring a tax base into the City of Philadelphia, it's going to bring employment into the City of Philadelphia, ah, this is, this is basically our job, ah George George's job and my job, ah, to try to get as much money into the City of Philadelphia and as many jobs into the City of Philadelphia as we possibly can.

A849-51. Wald asked:

WALD: [B]y dealing with you here this evening and, and the gentleman I, I spoke with last evening, can I go back with those assurances?

JANNOTTI: I don't see why not, as you say, ya know it's a legitimate project and you have your fi-

nancing, there's nothing ah, there's nothing that you're doing illegal . . .

CRIDEN: Michael wants to be sure that he has a friend if he has a problem.

JANNOTTI: Oh certainly.

WALD: If something arises, if something arises that needs a City Council vote to be very specific, a City Council vote is needed on the thing, can I count on your vote?

JANNOTTI: Why sure . . . . first of all we'll go over it again, you have a legitimate project, ah, you're going to invest 36 million dollars in the City of Philadelphia, which is going to create a tax base and going to create employment.

WALD: Right, but.

JANNOTTI: But ya, but.

HARIDOPOLIS: A lot of legitimate, ah, things get bogged down, we don't want to be bogged down.

JANNOTTI: No, I can't see this being bogged down.

A853-54. Wald explained his position:

WALD: Let me give you a short insight into the Arab mind, that its ah, it's at times difficult to understand now, ah, I can appreciate it because I've had both worlds and I can relate, ah, you know, you folks are here, right, they, they think differently, they deal differently, their psychological process are alien to the way I understand exactly what you're saying. Ok. I'm coming up with something that's going to help the City of Philadelphia. Ah, it would help, as it would help any city. Ah, he does not look on it that way. They do business, differently. They pay the freight up front. They make friends, right, and then when there, there is a potential problem then I don't mean, I don't mean a problem that would necessarily close down construction and throw the project out of Philadelphia.

A855-56.

Wald and Jannotti discussed City Council politics, and Jannotti affirmed Criden's statement that Council "never had a vote on an issue that George and Harry wanted passed that they'd lost in the last two years." A859. They then discussed the payment to Jannotti:

> WALD: But, you were here at the time. You convinced me right off the bat that we were in the right city and we would have no problems.
>
> CRIDEN: You will have no problems.
>
> WALD: And I would just as soon save the money, but I can't go back.
>
> CRIDEN: I understand, we had that discussion.
>
> WALD: (Pointing to Criden) Did he, was he very graphic with ya?
>
> JANNOTTI: Yes.
>
> WALD: On exactly how . . .
>
> JANNOTTI: (Nodding yes) He was always up front, up front.
>
> WALD: Ok and . . .
>
> CRIDEN: To the bottom line, you know me Michael, I, I don't we, we both do everything right up front.
>
> WALD: Ok and, alright, then I'm going to be, then I'm going to be up front with ya. I'm.
>
> CRIDEN: Exactly.
>
> WALD: Ah, you've been in business all your life, you've as you said, you got an education 20 years behind the bar, I was sent to Philadelphia to pay for certain things because that is the psychology and that is the method of business that these people are use to, and that is how they conduct business, they conduct with everybody they do. That's why I'm here. I understand their psychology, I've been involved with them long enough, ah to make it a major part of my life, a majority of my life.

JANNOTTI: Well, you know ah, just just on the basics, of what you said and what they want to do, it's enough for me to get on the floor and argue. I don't have to, even care what else they want to come up with. My basic point is, the fact that, ah what's coming in here, and this has been our job, to bring as much business and and, and ah tax base and employment to the City of Philadelphia. If that's the way they want to do business, that's all right too.

A859-61. Wald asked again for "assurances":

WALD: Can I go back, ah ah, to my employer, the Sheik and tell him that I dealt with a man, on Wednesday night tell him who he is, dealt with you, Thursday night, explain who you were, what your position is and say he and I conducted a cash business transaction and he guaranteed me, we don't have a problem in Philadelphia. We ah, ah City Councils on our side the man has the influence with the Finance Committee, he has influence . . .

JANNOTTI: You wouldn't, you wouldn't be able to say we don't have a problem. Problems might arise, but problems ah, you might say problems can be solved.

WALD: Ok, you can handle those problems we presume.

JANNOTTI: I don't see why not if it's a legitimate, if it's a if it's a legitimate if it's a, if it's a legitimate enterprise, it's a legitimate piece of business.

. . . .

WALD: By making friends with you this evening, if we have to go to City Council and say look, ya know, give us a break, right, got us some legislation that this is ok. That it's in the right neighborhood, that the time.

CRIDEN: If you want a street for example let's say changed from a two way to a one way ok, maybe that will help you.

WALD: Ok.

CRIDEN: Handle your traffic pattern.

JANNOTTI: We handle that everyday.

. . . .

WALD: But I go back and I'll say we have this, and I'll use that as an example that if we have a one way street situation and it's just hurting the front, of, of the place we cannot move people in and out of the hotel limousines to private vehicles and what have you, ah the men I dealt with said they will help. I'm not saying that you could walk in there and change this thing tomorrow, but.

CRIDEN: Yet.

JANNOTTI: We'll go in there and battle, we'll go in and battle.

WALD: You're with us?

JANNOTTI: Certainly, we'll go in and battle.

A863-67. Wald then took an envelope from his briefcase [containing $10,000 cash], handed it to Jannotti, and asked if "that amount is sufficient." Jannotti took the envelope, answering, "We've discussed it."

HARIDOPOLIS: You know how much it is?

CRIDEN: Tell him, you can tell him.

HARIDOPOLIS: How much is it?

CRIDEN: Tell him?

JANNOTTI: We won't even discuss it.

WALD: Ok, but you did discuss it with Howard?

JANNOTTI: We won't even discuss it.

HARIDOPOLIS: Is this arrangement please, pleasing to you?

JANNOTTI: As I say, we won't even discuss it.

WALD: Ok, well, we've done our business.

A884-85. Jannotti departed, and Criden promised to see him downstairs.

II.

HOBBS ACT CONSPIRACY

In its opinion granting the motions for acquittal the district court noted that the "evidence permitted, although it did not compel, the inference that the payments represented bribes paid in exchange for the defendants' assurances of using their official positions to pave the way for expeditious completion of the project." 501 F. Supp. at 1184. The court, however, dismissed Count III of the indictment, the Hobbs Act conspiracy count, for two reasons. The first dealt with the fictitious nature of the scheme. Although the court was willing to assume that the "evidence permitted the jury to conclude that, if the project had in fact been a genuine project, it would have required the movement of articles in interstate commerce, and that the payment of these bribes would have affected such commerce by depleting the funds available for carrying out the project,"[8] the court focused on the fact that "there never was any such planned project. The Arabs, their plans, and their money were all entirely fictitious." *Id.* The court concluded:

> While the jurisdictional reach of the Hobbs Act is undoubtedly extensive, touching conduct having only minimal or potential impact upon commerce (broadly defined), it does not operate to confer federal jurisdiction over purely hypothetical potential impacts on commerce which could never occur.

Id. at 1185. The district court thus fashioned a requirement that conviction for conspiracy to violate the Hobbs

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8. In charging the jury on the Hobbs Act count, the court instructed that it must find that "a natural and probable consequence of the extortion, the receiving the money, would have been to affect interstate commerce" and that the Government position was that the receipt of the payments of $30,000 and $10,000 would have had an effect on interstate commerce. A1344-45.

Act requires an actual potential effect on interstate commerce.

The second jurisdictional defect, according to the district court, stemmed from its view that the Hobbs Act does not cover the "passive acceptance of gratuities by public officials." *Id.* The district court, after noting that defendants did not request payment and "made it very clear that the payments would not be necessary", found that the convictions would represent "a substantial stretching of the definition of extortion." *Id.*

A.

Effect on Interstate Commerce

The broad language of the Hobbs Act, covering anyone who "in any way or degree . . . affects commerce . . . by . . . extortion or attempts or conspires so to do . . .", 18 U.S.C. §1951,[9] demonstrates Congress' intent to free interstate commerce from burdens of any kind caused by extortion. The Supreme Court has expressly recognized that the statute manifests a congressional purpose "to use all the constitutional power Congress

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9. The Hobbs Act reads in pertinent part as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

18 U.S.C. §1951(a). The statute defines "commerce" as

> commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. §1951(b)(3).

has to punish interference with interstate commerce . . . ." *Stirone v. United States*, 361 U.S. 212, 215 (1960). *Accord, e.g., United States v. Cerilli*, 603 F.2d 415, 423 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980). *See also United States v. Culbert*, 435 U.S. 371 (1978); *United States v. Green*, 350 U.S. 415, 420-21 (1956). *In United States v. Staszcuk*, 517 F.2d 53, 58 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975), the court concluded that "the purpose of the Hobbs Act parallels the central purpose of the Commerce Clause itself." Thus, the decision of the district court in this case has application beyond the Hobbs Act because the extent of Congress' power under the commerce clause is implicated, and, if its analysis is accepted, will have ramifications for all federal criminal statutes enacted under Congress' commerce clause power.

We begin the analysis of Congress' power to regulate interstate commerce with the now-accepted principle that the commerce clause reaches, *inter alia*, activities *affecting* interstate commerce. *Perez v. United States*, 402 U.S. 146, 150 (1971); *United States v. Darby*, 312 U.S. 100 (1941). However, application of a federal criminal statute is not limited to those cases in which an actual interstate effect is shown. Instead, as the Court recognized in *Perez v. United States*, 402 U.S. at 152-53, it is enough that the conduct falls within the "class of activities" within the reach of federal power.

Schwartz and Jannotti were convicted of a conspiracy to violate the Hobbs Act, rather than of a substantive violation of the Hobbs Act. A substantive violation of the Hobbs Act generally is supported by proof of an actual effect on commerce. *See, e.g., United States v. Mazzei*, 521 F.2d 639, 642 (3d Cir.) (en banc), *cert. denied*, 423 U.S. 1014 (1975). *But see United States v. Staszcuk*, 517 F.2d 53, 59-60 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975) (actual effect need not be shown; "realistic probability" of effect is sufficient). Defendants

argue that it follows that a prosecution for conspiracy to violate the Hobbs Act also requires proof "that commerce must have been affected." Brief for Appellee Jannotti at 22. In so arguing, defendants overlook the significant distinction between a conviction for a substantive offense and a conviction for a conspiracy to commit the substantive offense. This distinction was recognized by the district court at an early stage of the litigation when it dismissed the substantive Hobbs Act counts of the indictment on the ground that there was no possibility that the bribe payments could actually have affected commerce, but left standing the conspiracy count on the possibility that federal jurisdiction could be grounded on proof that the conspiracy, if completed, would affect commerce. *See* 501 F. Supp. at 1184. The subsequent dismissal of Count III of the indictment was apparently grounded on the district court's changed view of the law that an actual potential effect was required, even for a conspiracy conviction. We believe the district court's earlier view was the correct one

Because an agreement between two or more persons to commit criminal acts poses, in and of itself, a serious danger to social order, it is proscribed by the law of conspiracy. *See Callanan v. United States,* 364 U.S. 587, 593 (1961). The ultimate failure of the conspiracy may diminish, but does not eliminate, the threat it poses to social order; therefore, the illegality of the agreement does not depend on the achievement of its ends. *See generally United States v. Shoup,* 608 F.2d 950, 957 n.13 (3d Cir. 1979); *United States v. Bobo,* 586 F.2d 355, 371 (5th Cir. 1978), *cert. denied,* 440 U.S. 976 (1979). It is similarly irrelevant that the ends of the conspiracy were from the very inception of the agreement objectively unattainable. *United States v. Waldron,* 590 F.2d 33 (1st Cir.), *cert. denied,* 441 U.S. 934 (1979) (conviction for conspiracy to transport stolen goods in excess of $5,000 affirmed, even though, unknown to defendants,

property transported was worth less than $5,000); *United States v. Thompson*, 493 F.2d 305 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974) (defendant can be convicted of conspiracy to smuggle marijuana even though substance was not shown to be marijuana). In this case the defendants agreed to do acts which, had they been attainable, would have affected commerce. At that point, regardless of whether an actual effect on commerce was "reasonably probable," a sufficient federal interest was implicated to support federal jurisdiction over that agreement.

The Hobbs Act, by its own terms, encompasses the inchoate offenses of attempt and conspiracy to extort. Convictions for these offenses have been sustained notwithstanding the absence of any evidence of an actual effect on interstate commerce. In *United States v. Rosa*, 560 F.2d 149, 153 (3d Cir.) (en banc), *cert. denied*, 434 U.S. 862 (1977), a case in which there was no effect on commerce because the "victim" refused to pay the extortion demand, we stated that a defendant may be convicted under the Hobbs Act for an "attempted extortion which would, if the act were completed, have the effect of obstructing commerce." *See also United States v. Bellomini*, 454 F. Supp 44, 47 (W.D. Pa. 1978) ("The fact that the business enterprise was frustrated at a later date through failure of finances does not constitute a defense to a charge of attempt to extort money in violation of the Hobbs Act."). Similarly, in *United States v. Caci*, 401 F.2d 664 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969), the Second Circuit sustained the conviction of defendants for conspiracy to rob an armored car messenger in violation of the Hobbs Act although the plan was aborted.

Counsel for defendants conceded at oral argument that they could point to no precedent to support their contention that a conviction for conspiracy to violate the Hobbs Act must be predicated on a showing of an actual

or probable future effect on interstate commerce. One of the few cases to focus on the interstate commerce aspect of the Hobbs Act, *United States v. Staszcuk*, 517 F.2d 53 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975), arose when a local alderman was convicted of a substantive Hobbs Act violation. The government had proven that he received $3,000 and that he did not oppose a zoning change which authorized the construction of an animal hospital. Because no such hospital was ever built, the court noted that "there is no evidence that either the zoning change or the payment had any effect whatsoever, either favorable or unfavorable, on interstate commerce." *Id.* at 55. Judge, now Justice, Stevens, writing for a majority of the en banc court, considered whether the federal statute reached extortion under those circumstances, and concluded: "We are . . . persuaded that the cases which uniformly hold *that a threatened effect on interstate commerce is sufficient to bring the statute* into play notwithstanding the absence of any actual effect, correctly interpret the congressional purpose." *Id.* at 59 (emphasis added).

We believe Justice Stevens' approach is dispositive of the jurisdictional issue before us. Congress can constitutionally reach inchoate offenses because these offenses pose a potential threat to interstate commerce; the existence of such a threat ties "the proscribed conduct to the area of federal concern delineated by the statute." *United States v. Feola*, 420 U.S. 671, 695 (1975). The appropriate inquiry then is not whether the defendants' perceptions can invest the courts with federal jurisdiction, as the district court viewed the issue, but whether the defendants' conduct constituted a sufficient threat to interstate commerce so as to implicate an "area of federal concern" sufficient to give rise to federal jurisdiction.

In essence the defendants are arguing that we should accept an impossibility defense when federal ju-

risdiction is predicated on interstate commerce. We believe such a defense must be rejected here. In substantive Hobbs Act convictions, the requisite nexus to interstate commerce has been found in the depletion of assets theory, because the payment of an extortion demand may reduce the assets available for the purchase of goods originating in other states. *See, e.g., United States v. Cerilli*, 603 F.2d 415, 424 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980); *United States v. Addonizio*, 451 F.2d 49, 77 (3d Cir. 1971), *cert denied.*, 405 U.S. 936 (1972). In *United States v. Rindone*, 631 F.2d 491 (7th Cir. 1980), the Hobbs Act conviction of a municipal inspector who had extorted money in exchange for work permits was challenged on the ground that there was no nexus with interstate commerce under the depletion of assets theory because the Federal Bureau of Investigation had supplied the money used in the extortionate transaction. In rejecting this claim, the court reviewed Hobbs Act cases which upheld jurisdiction although no depletion of assets affecting interstate commerce had or could take place and affirmed the "federal interest in deterring even futile threats to interstate commerce", 631 F.2d at 493, referring to *United States v. Staszcuk*, 517 F.2d at 57. The *Rindone* court concluded:

> As the court noted in [*United States v. Brooklier*, 459 F. Supp. 476 (C.D.Cal. 1978)], "[t]his extortion completed a plan that would have actually affected commerce but for a fact unknown to defendants, *i.e.*, that [the victim] was a company not actually engaged in commerce." *Id.* at 478. The presence here of a fact not known to Rindone, *i.e.*, that the FBI provided the payoff money, is likewise irrelevant to the jurisdictional inquiry.

631 F.2d at 494. In the *Brooklier* case, relied upon by the Seventh Circuit, the victim corporation was an F.B.I.-created shell that in fact had no interstate deal-

ings. Jurisdiction under the Hobbs Act was nonetheless upheld.

In construing other federal statutes, the courts also have expressed an unwillingness to accept impossibility as precluding jurisdiction. In *United States v. Rose*, 590 F.2d 232 (7th Cir. 1978), *cert. denied*, 442 U.S. 929 (1979), two defendants who had agreed to burglarize a home in Arizona and to transport the stolen goods to Illinois, unwittingly engaged F.B.I. agents to perform the theft and to transport the goods. The agents never intended to commit the thefts and no goods were ever stolen; instead the defendants were arrested and convicted of conspiracy to transport goods interstate knowing the goods to be stolen. Although the issue of federal jurisdiction was not expressly raised, the court, in affirming the convictions under 18 U.S.C. §§371, 2314, commented:

> Here [defendants] intended to cause the goods to be stolen and then transported in interstate commerce with knowledge that they had been stolen. All that was necessary, in addition to an overt act, was that the intended future conduct they had agreed upon include all the elements of the substantive crime.

590 F.2d at 235. This statement reflects the court's view that the defendants' plan to transport the goods interstate, even though unattainable from the outset, sufficiently impinged on an area of federal concern to justify federal regulation and prohibition. *See also Craven v. United States*, 22 F.2d 605, 609 (1st Cir. 1927), *cert. denied*, 276 U.S. 627 (1928) (conviction for conspiracy to import foreign liquor without payment of tariff can be sustained based on defendants' erroneous beliefs that liquor was of foreign origin).

Defendants have argued that the holding in *United States v. Feola*, 420 U.S. at 695-96, supports their view that an essential jurisdictional element cannot be estab-

lished by reference solely to the state of mind of the defendant. *Feola* provides no support for the defendants' theory. In *Feola*, even though the defendants did not intend to assault a federal officer, the Court held that they could be still convicted for conspiring to violate the federal statute, 18 U.S.C. §111, which prohibits an assault on a federal officer. In holding that there was a "sufficient threat" to an "area of federal concern" to meet the federal jurisdictional requirement as long as a federal officer was in fact the target of the planned attack, 420 U.S. at 695, the Court did not preclude the existence of federal jurisdiction where the intended victim is believed to be a federal officer, but in fact is not.

In fact, the language in the *Feola* opinion and the approach taken by the Court there support our final reason for rejecting the district court's holding that an actual potential effect on interstate commerce is a jurisdictional prerequisite for a conviction for conspiracy to violate the Hobbs Act. Defendants have been able to offer this court no policy reason for us to accept their restrictive view of Congress' constitutional power to legislate as to conspiracies which pose a threat to interstate commerce. Defendants agree that had the government moved from the verbal ruse that its agents were in the hotel construction business to the more concrete action of embarking on that venture, *see United States v. Gambino*, 566 F.2d 414 (2d Cir. 1977), *cert. denied*, 435 U.S. 952 (1978), the jurisdictional requirement would have been met. However, we see no reason to interpret Congress' legislative power as dependent upon whether the F.B.I. agents actually contract for a hotel site, purchase machinery to dump garbage, or establish their own fencing operation for the purchase of stolen goods. To require that the government take that additional step before it can constitutionally reach a proven conspiracy which would have affected interstate commerce had the facts been as represented misdirects the focus of the conspiracy cases. As the Court noted in *Feola*, "[T]he

law of conspiracy serves ends different from, and complementary to, those served by criminal prohibitions of the substantive offense." 420 U.S. at 693. The Court identified the dual purposes of conspiracy law, "protection of society from the dangers of concerted criminal activity," and sanctions against those agreements which pose great likelihood of commission of an act due to well formed criminal intent. *Id.* at 693-94.

In this case the jury found that the defendants conspired to violate the Hobbs Act by their acceptance of payments in return for their promises to expedite completion of an elaborate hotel project which, had it been constructed, would have entailed at least a $30 million expenditure. Had the project actually been planned as represented, defendants' actions would have violated the Hobbs Act even if unforeseen difficulties, such as the overthrow of the "sheik", prevented any further action on the project. The federal interest in protecting interstate commerce is no less under the factual situation presented in this case. The threat posed by defendants' actions is just as great. Since Congress has exercised the full scope of its commerce power in the Hobbs Act, we conclude that there was Hobbs Act jurisdiction.

B.

Extortion "Under Color of Official Right"

As an additional ground for dismissing the Hobbs Act count the district court held that defendants' conduct did not constitute "extortion" under the Act because they, at most, "passive[ly]" accepted the bribes. 501 F. Supp. at 1185. The Act defines "extortion" as:

> the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. §1951(b)(2).

The district court's holding is inconsistent with the rationale underlying the holdings of this court that the Act is disjunctive and proscribes the "obtaining of property from another . . . under color of official right," without proof of coercion by the defendant. *United States v. Kenny*, 462 F.2d 1205, 1229 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972). We reaffirmed this principle in *United States v. Mazzei*, 521 F.2d 639 (3d Cir.) (en banc), *cert. denied*, 423 U.S. 1014 (1975), where we stated:

> A violation of the statute may be made out by showing that a public official through the wrongful use of office obtains property not due him or his office, even though his acts are not accompanied by the use of "force, violence or fear."

Id. at 645 (citations omitted). In *Mazzei*, we observed that "the 'under color of official right' language [of the Hobbs Act] 'repeats the common law definition of extortion.' " *Id.* (citation omitted). At common law, extortion was defined as "any officer's unlawfully taking, by color of his office, from any man, any money or thing of value that is not due to him." 4 W. Blackstone, *Commentaries* *141. The requirement that the money be taken "by color of his office" meant "simply that the officer must have taken money not due him for the performance of his official duties." *State v. Weleck*, 10 N.J. 355, 372, 91 A.2d 751, 759 (1952). Thus, "[i]f the [Hobbs] Act is read in full, the distinction between bribery and extortion becomes unnecessary where public officials are involved." Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 Seton Hall L. Rev. 1, 14 (1971). More recently, in *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980), we upheld the conviction of state officials who received bribes in return for conferring valuable state

contracts, and approved the district court's charge that extortion under "[c]olor of official right is defined as the taking by a public official of money not due him or his office . . . ."

The holding in our cases that the Hobbs Act covers the acceptance of bribes by public officials even when payment was not obtained by force, threats, or use of fear, and the further suggestion that there need be no inducement or prior request for such payments, accords with the view taken by other courts of appeals. In *United States v. Hedman*, 630 F.2d 1184 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), the government proved at trial that defendants, city building inspectors, accepted money from builders who failed to conform with the building code, but no solicitation of the bribes was shown. In rejecting defendants' argument that the government must show that the officials were the "initiators" or "inducers" of the alleged payments, the court stated:

> It is settled law in this Circuit as well as others that in a Hobbs Act prosecution for extortion under color of official right it is unnecessary to show that the defendant induced the extortionate payment. . . . The Government is merely required to prove that a public official obtained money to which he was not entitled and which he obtained only because of his official position.

Id. at 1195 (footnote omitted). The Sixth Circuit has also held that the "technical overdrawn distinction" which the public officials sought to make there between bribery and extortion under the Hobbs Act is not in keeping with the legislative intent, and that "in cases of misuse of official power, bribery and extortion are not mutually exclusive." *United States v. Butler*, 618 F.2d 411, 417 (6th Cir. 1980), *cert. denied*, 447 U.S. 927 (1980) and 449 U.S. 1089 (1981).

Defendants argue that in each of the cases in which this court seemed to interpret the Hobbs Act to cover passive acceptance of a bribe by a public official, the defendant had in fact engaged in some conduct which could be construed as inducement of the payment. Even if the Hobbs Act were to be construed as requiring some inducement on the part of the public official, defendants' conduct in this case hardly constituted merely passive acceptance of the payments. The evidence does not fit the defendants' posited illustration of an unexpected bribe mailed to a public official's office. On the contrary, rather than remaining in their own offices, the evidence shows that each defendant arrived at the Barclay suite after having been briefed about the purported hotel project, the fact that there would be a payment made, and the specific amount of the payment which would be made to each. Although there is no verbatim record of Criden's earlier conversation with Schwartz, Criden reported to Wald that he told Jannotti before the January 24th meeting that the hotel builders wished assurances that there would be no municipally imposed obstacles to the project, and that the builders were willing to pay for such assurances. A897. As soon as each defendant was in the Barclay suite, Wald, the F.B.I. agent, promptly repeated the need for such assurances. Thereafter, Schwartz launched into a discourse on his own importance and power and his ability to control City Council and the relevant municipal officials and departments, A692-96, 709-13, *see* pages 13-16 *supra*, and Jannotti also confirmed his own power. A858-59, *see* page 21 *supra*. Further, each gave assurances that there would be no obstacles or that the obstacles, if any, would be manageable. Thus, each defendant's appearance at the Barclay in expectation of a payment and his conduct in providing such assurances evidences more than mere "passive" acceptance of the bribes,[10] and falls within the

10. The district court's statement, without citation to the record, that the evidence "clearly" establishes that the defendants

Hobbs Act definition of extortion under color of official right.

Accordingly we hold that the district court erred in dismissing Count III of the indictment.

III.

ENTRAPMENT

As Justice Harlan noted, the meaning, purpose, and application of the defense of entrapment in criminal cases are problems that have sharply divided the Court. *See Lopez v. United States*, 373 U.S. 427, 434 (1963). *See also United States v. Russell*, 411 U.S. 423, 439-40 (Stewart, J., dissenting) (1973). To a large extent, that division has centered on whether the controlling standard focuses on the conduct of the government (the objective test) or the predisposition of the defendant (the subjective test). The legal principles which determine the application of the entrapment defense in this case, however, are not in serious dispute. The parameters of the entrapment defense are largely to be found from the four principal cases in which the defense has been considered by the Supreme Court, *Sorrells v. United States*, 287 U.S. 435 (1932); *Sherman v. United States*, 356 U.S. 369 (1958); *United States v. Russell*, 411 U.S. 423 (1973); and *Hampton v. United States*, 425 U.S. 484 (1976).

In *Sorrells v. United States*, where the Court first recognized the defense of entrapment, the Court held the defendant was entitled to have the jury consider

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"made it very clear that the payments would not be necessary," 501 F. Supp. at 1185, does not fairly represent the only possible construction of the evidence, and the jury accepted a contrary construction. The district court's statement is also inconsistent with the court's own finding that the evidence permitted the inference that the payments were "in exchange for the defendants' assurances of using their official positions to pave the way for expeditious completion of the project." 501 F. Supp. at 1184.

whether his acts of possessing and selling one-half gallon of whiskey in violation of the National Prohibition Act were instigated by the prohibition agent who implanted in the "mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that [Government officials] may prosecute." 287 U.S. at 442. The nature of the defense was outlined more fully when the Court next considered the defense a quarter of a century later in *Sherman v. United States*. Chief Justice Warren, writing for the majority of the Court, stated that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." 356 U.S. at 372. In concluding that entrapment had been established as a matter of law, the Court determined from the undisputed testimony of the prosecution's witnesses that the defendant was induced to sell narcotics by the government informer and that he was not predisposed, *i.e.*, that he engaged in conduct he would not otherwise have attempted. The Court noted, "Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials." *Id.* (emphasis in original).

In *United States v. Russell*, the Court expressly disapproved of the decisions of the lower federal courts which had expanded the entrapment defense beyond the Court's opinions in *Sorrells* and *Sherman*. Instead, the Court reiterated that the defense was not of constitutional dimension, and reaffirmed its prior opinions that established that entrapment is a "relatively limited defense", 411 U.S. at 435, which cannot be used by a predisposed defendant. Most recently, in *Hampton v. United States*, a majority of the Court, in two separate opinions, upheld defendant's conviction arising from his sales of heroin which had allegedly been procured from a government informant, reaffirming once again the

unavailability of the entrapment defense to a predisposed defendant.

Emerging from these cases are the principles which guide our review of the evidence which defendants argue and the district court found established entrapment as a matter of law. As the Court stated in *Sorrells*, "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." 287 U.S. at 441. Entrapment occurs when a defendant who was not predisposed to commit the crime does so as a result of the government's inducement. The entrapment defense thus focuses on "the intent or predisposition of the defendant to commit the crime." *United States v. Russell*, 411 U.S. at 429. As we have previously held, the government has the burden "to disprove the whole [entrapment] defense beyond a reasonable doubt," *United States v. Watson*, 489 F.2d 504, 510 (3d Cir. 1973).[11]

Finally, although there may be instances where the undisputed facts establish the entrapment defense as a matter of law, as in *United States v. Sherman*, or where the evidence is simply insufficient to submit the issue to the jury, *see, e.g., United States v. Armocida*, 515 F.2d 49, 55-56 (3d Cir. 1975); *United States v. Payseur*, 501 F.2d 966, 970-71 (9th Cir. 1974); *United States v. Smith*, 489 F.2d 1330, 1334-35 (7th Cir. 1973), *cert. denied*, 416 U.S. 994 (1974), entrapment is generally a jury question. *See United States v. Lentz*, 624 F.2d 1280, 1286 (5th Cir. 1980), *cert. denied*, 450 U.S. 995 (1981); *United States v. Bocra*, 623 F.2d 281, 288-89 (3d Cir.), *cert. denied*, 449 U.S. 875 (1980); *United States v. Twigg*, 588 F.2d 373, 376 (3d Cir. 1978). *See also United States v. Klosterman*, 248 F.2d 191, 194-95

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11. *See* discussion of burden of proof in Murchison, *The Entrapment Defense in Federal Courts: Modern Developments*, 47 Miss. L.J. 573, 604-06 (1976).

(3d Cir. 1957); *Tzimopoulos v. United States*, 554 F.2d 1216, 1217 (1st Cir.) (per curiam), *cert. denied*, 434 U.S. 851 (1977). This court has held that a defendant is entitled to an entrapment instruction,

> however unreasonable the judge would consider a verdict in favor of the defendant to be, when the accused shows (1) evidence that the Government initiated the crime, regardless of the amount of pressure applied to the defendant, and (2) any evidence negating the defendant's propensity to commit the crime.

United States v. Watson, 489 F.2d at 509.

The district court in this case submitted the issue of entrapment to the jury following a jury charge on that issue which is not here challenged. After the jury decided that defendants were not entrapped, the district court reconsidered the propriety of such submission in ruling on defendants' motions for acquittal. The court summarized the government's evidence as relying exclusively upon the fact that each defendant did accept money from the agents. The district court agreed that "[i]n some situations . . . a defendant's ready acquiescence in the Government's suggestion may be enough to justify a finding of predisposition." *United States v. Jannotti*, 501 F. Supp. at 1200. *See, e.g., United States v. Valencia*, 645 F.2d 1158, 1167-68 (2d Cir. 1980) (ready response to drug sale proposal); *United States v. Viviano*, 437 F.2d 295, 299 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971) (ready response to bribe solicitation).

However, the district court overturned the jury's decision. Although the court remarked that, "No-one who has viewed the videotape evidence in this case could avoid feelings of distress and disgust at the crass behavior the tapes reveal," it gave judgment for the defendants because "[t]he evidence was, as a matter of law, insufficient to establish the defendants' predisposition beyond

a reasonable doubt." 501 F. Supp. at 1200. In support of that decision, the district court relied on three factors.

> In my opinion, in their zeal to make sure that the defendants would accept the tendered payments, the government agents offered such *attractive inducements as to preclude any reliance upon the defendants' acceptance* of the money as proof of predisposition. In the first place, the amounts offered were *exceedingly generous*. Standing alone, the very amounts of the bribes were, to paraphrase the language of the court in *Scriber v. U.S.*, [4 F.2d 97 (6th Cir. 1925)], "a substantial temptation to a first offense."
>
> In the second place, it was clear that the *defendants would not be asked or expected to do anything improper on behalf of the proposed hotel venture*; and they agreed to do nothing inconsistent with their obligations as members of the City Council, working for the benefit of their constituents.
>
> Finally, and most importantly, they were led *to believe that if they did not accept the money, the project would not come to Philadelphia*. In the context of the fiscal crises which beset all large cities these days, and in the context of the problems of urban blight and decay, the governmental inducement in this case was indeed calculated to overwhelm.

Id. (emphasis added).

Before turning to that evidence, it will be useful to reiterate briefly the applicable principles governing deference to the jury's findings. In ruling on a motion to overturn a jury's finding of predisposition the trial court must view the evidence in the light most favorable to the prosecution, and resolve all reasonable inferences therefrom in its favor. *See Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Artuso*, 618 F.2d 192, 195-96 (2d Cir.), *cert. denied*, 449 U.S. 861 (1980).

Credibility determinations are for the jury. *See, e.g., United States v. Bocra*, 623 F.2d 281, 289 (3d Cir.), *cert. denied*, 449 U.S. 875 (1980). Viewing the evidence in this light, the trial court must uphold the jury's verdict unless no reasonable jury could conclude beyond a reasonable doubt that the defendant was predisposed to commit the offense for which he was convicted. *See Burks v. United States*, 437 U.S. 1, 16 (1978). Obviously, in reviewing a district court's decision to disregard a jury verdict, we apply the same standard. *Id.* at 17; *United States v. Dixon*, 658 F.2d 181, 188 (3d Cir. 1981). Thus, we must independently examine the evidence on the three factors relied upon by the district court to determine whether it was as overwhelming for the defendants as the district court found. If not, it was error to withdraw the decision on the predisposition issue from the jury.

A.

The size of the payments

The undisputed evidence shows that Schwartz, chairman of Philadelphia City Council, accepted a payment *in cash* of $30,000 from an F.B.I. agent posing as a representative of the sheik, that he looked inside the envelope, fingered the bills, and licked the envelope closed. The evidence also shows that Jannotti, a member of Philadelphia City Council, accepted a payment in cash of $10,000 from the same F.B.I. representative, that he placed the envelope in his pocket without opening it, and that he declined to discuss the amount of the payment, repeating several times "We won't even discuss it."

The district court, without any reference to the record or any analysis of the issue, characterized the amounts offered as "exceedingly generous" and determined that "the very amounts of the bribes were . . . 'a substantial temptation to a first offense.' " 501 F. Supp.

at 1200. In effect, the district court held that no reasonable jury could have found predisposition from the defendants' on-tape conduct because of the nature of the inducement offered to the defendants.

Even if the dollar amount offered were relevant to disprove predisposition, a question which we do not decide, we find nothing in the record to support the district court's conclusion that in today's inflationary times, city councilmen would view sums of $30,000 or $10,000 as so large or generous as to overcome an official's natural reluctance to accept a bribe. Certainly, the question of the generosity of the sums given must be viewed in relationship to the circumstances of the acceptors. What would be tempting to an office clerk would plainly not be enough to tempt a millionaire. Yet the record is almost bare of any evidence of the defendants' financial situations. What the record does disclose hardly suggests that either man was in dire straits financially. Schwartz was a practicing lawyer until 1970 or 1971 and, until that time, a partner of a large and active center city Philadelphia law firm. In his discussion with Wald, Schwartz stated:

> SCHWARTZ: And, uh, I was a senior partner in a very large law firm, but decided to give up the practice completely and sever my connections with the firm to devote full time to my councilmatic duties. I felt that, uh, it was the proper thing for me to do, for my own discretion. The then mayor, who is now out of office, Frank Rizzo, who was the former police commissioner. And, uh, you know, you think things out.
>
> WALD: Uh-hmm.
>
> SCHWARTZ: And fortunately, I didn't have to worry about earning a livelihood, I've, I've been a real estate lawyer, corporate practice real estate, administrative agency law. . . .

A694-95. Furthermore, Schwartz did not expect to keep the entire $30,000. As the district court found,

> However, Schwartz accompanied Criden to a meeting with the undercover agents on January 23, 1980, and the videotape of that meeting, together with other evidence, demonstrates that Schwartz knew he would be paid $30,000, and that the payment would be shared in some way with Criden.

501 F. Supp. at 1198.

Jannotti, who in addition to his City Council salary also owned a bar, made a statement to an F.B.I. agent during the subsequent investigation that his bar made "more than $10,000 and there would be no reason for him to take that kind of money." A925.

In *United States v. Myers*, Nos. CR80-00249, CR80-00253, CR80-00291, slip op. at 59 (E.D.N.Y. July 24, 1981), the district court was faced with a similar issue and commented that today "$50,000 is simply not an overpowering sum of money." It also noted that other legislators approached with bribes of sums greater than $30,000 found themselves capable of rejecting the offers. *Id.* at 53, 60.

The jury was well aware of the amount of the bribes as well as the defendants' stations in life. Since there is nothing in the record to support the district court's conclusion that the amounts involved were, *as a matter of law*, so generous and enticing as to overcome any possible refusal by the defendants, the court's action in overturning the jury's resolution of this issue was plainly an intrusion on the jury's prerogative.

B.

The "benignity" of the payments

The second of the three factors which the district court stressed in holding that the evidence was insufficient as a matter of law to establish that the defendants'

acceptance of the money showed their predisposition was that "the defendants would not be asked or expected to do anything improper on behalf of the proposed hotel venture" and that "they agreed to do nothing inconsistent with their obligations as members of the City Council, working for the benefit of their constituents." 501 F. Supp. at 1200. The district court stated that "there was no suggestion that the putative sheik required or expected any violation of the law in exchange for the payment; he merely wished to be assured that he had 'friends' in high places." *Id.* at 1194.

There is a fundamental inconsistency in the district court's view of the evidence in this part of its opinion and the court's earlier statement in the same opinion that

> [t]here is no dispute about the defendants' receipt of the payments, and *the evidence permitted*, although it did not compel, *the inference that the payments represented bribes paid in exchange for the defendants' assurances of using their official positions to pave the way for expeditious completion of the project*.

501 F. Supp. at 1184 (emphasis added). The district court never attempted to reconcile the two statements. It may be that the district court, in stating that defendants agreed to do nothing "improper", was referring to the defendants' repeated statements on tape that they assumed that the hotel was to be a legitimate venture and their frequent comments that the project would be good for Philadelphia. However, as the district court acknowledged, the evidence permitted the inference that the payments represented "bribes" to elected public officials in return for the use of their official positions. We fail to see how any court anywhere under any circumstances can fail to characterize a public official's acceptance of payment to "pave the way for expeditious completion of the project" as "improper".

The government argues that defendants' arrival at the hotel room after 10 o'clock in the evening to meet with total strangers, and the statements of Criden and Johanson indicating that Schwartz and Jannotti would be ready and willing to accept payments in return for political favors and that they had done so in the past, *see, e.g.*, A497-500, support the jury's determination that the defendants were predisposed. However, even if we were to look only at the defendants' own statements and actions shown on the tapes, there is no justification for taking from the jury the question of the nature of defendants' undertaking.

To recapitulate some of the relevant evidence, early in the meeting at the Barclay Hotel between Schwartz, Wald and Criden, Wald made it clear that he was seeking political favors in connection with the hotel venture. Thus, whatever Schwartz' expectations actually were about the services he was to perform for the anticipated fee following Judge Shiomos' references to a "consulting opinion", a reasonable jury could have found that in the course of Schwartz' meeting at the Barclay it became clear that what was at stake was the exchange of future political favors by the President of Philadelphia's City Council for cash to be paid on the spot. See pp. 12-17 *supra*.

Furthermore, in light of Schwartz' response to Wald's overture ("we got five or six [city council] members that came in . . . you tell me your birth date. I'll give them to you for your birthday," A695-6), a reasonable jury could find that Schwartz quickly dispelled any notion that he thought he was meeting Wald for legitimate "consulting" work. City Council members are simply not "given" as birthday gifts to prospective enterpreneurs as part of a "consultation."

The evidence as to Jannotti, if not quite as strong as that against Schwartz, also could be construed by a reasonable jury as proving that the payment was made for

political support, for Jannotti's vote, thereby belying any suggestion that it was made for "friendship". With Jannotti as with Schwartz, Wald explained "I'm only here for one reason, to bring back some assurances," A849, and characterized the understanding between them as a "cash business transaction" in which Jannotti "guaranteed . . . that we don't have a problem in Philadelphia. . . ." A863. A reasonable jury could view the assurances given by Jannotti as his willingness to commit his City Council vote, A853-54, and to use his political influence. A863-67. See pp. 19-24 *supra*.

The district court stressed the concern expressed by both Schwartz and Jannotti that the project be "legal" and "legitimate". As the evidence shows, Schwartz expressed concern that the hotel was not to be used for immoral purposes, and Jannotti was concerned that the hotel was not to be used for gambling. While the defendants' statements may indicate their unwillingness to support the project if it were to be used for such illegal purposes, either because they were interested in Philadelphia's welfare or because such use would become a matter of public knowledge, they fail to negate the permissible inference that both men knew they were acting improperly in accepting money in return for their support and influence. As this court has previously held, it is neither material nor a defense to bribery that "had there been no bribe, the [public official] might, on the available data, lawfully and properly have made the very recommendation that [the briber] wanted him to make." *United States v. Labovitz*, 251 F.2d 393, 394 (3d Cir. 1958). Judge Hastie, writing for the court, set forth the rationale for that holding:

> It is a major concern of organized society that the community have the benefit of objective evaluation and unbiased judgment on the part of those who participate in the making of official decisions. Therefore, society deals sternly with bribery which

> would substitute the will of an interested person for the judgment of a public official as the controlling factor in official decision.

Id.

The district court, in discussing some of the evidence, stated that Schwartz' words and actions during the meeting, as disclosed on the videotape, could be interpreted to mean either "that he was rendering legal advice and advice as an expert on city government and real estate development, in exchange for a consulting fee" which would "merely" violate the City Charter' prohibition against conflicts of interest, or "that he was accepting a bribe for assuring his official support of a project he would have been willing to support in any event." *Id.* at 1198.

In the posture of the case before us, we cannot accept the "consulting fee" view of the payment to Schwartz (no similar contention having been made as to Jannotti). It has often been stated by this court that a defendant who chooses to defend on the ground of entrapment must admit that there were present all the elements of the crime with which he or she was charged. *United States v. Shoup*, 608 F.2d 950, 964 (3d Cir. 1979); *United States v. Levin*, 606 F.2d 47, 48-49 (3d Cir. 1979) (per curiam); *United States v. Watson*, 489 F.2d 504, 507 (3d Cir. 1973). The district court adopted a restrictive view of the holdings in these cases by interpreting them as conditioning the entrapment charge on defendants' admission only of the operative facts. 501 F. Supp. at 1201. Subsequent to the district court's opinion, we considered whether an entrapment defense required admission of the relevant *mens rea* and stated that the entrapment defense "requires admission of guilt of the crime charged and all of its elements, including the required mental state." *United States v. Hill*, 655 F.2d 512, 514 (3d Cir. 1981). Thus, our precedent suggests that since acceptance of a bribe was an element of

the crime with which Schwartz was charged, Schwartz was required to forego the argument that receipt of the money was a benign "consulting fee" if he was to rely on the entrapment defense. *But see United States v. Demma*, 523 F.2d 981 (9th Cir. 1975) (en banc).

The other difficulty in the willingness of the district court to view the payments as benign is the obvious substitution of its view for that of the jury. As the district court recognized, the jury accepted the view that the payments were not "consulting fees" but were bribes. 501 F. Supp. at 1198-99. The jury was expressly instructed that it must determine whether each defendant understood that the money was being paid to influence his vote or conduct. The court charged:

> You would ask yourselves at the conclusion of the transaction and in the totality of the circumstances: Did that particular defendant understand that money was being paid to him to influence his vote, to influence his conduct in his official position or was this a situation in which the defendant understood merely that the money was to be paid in order to enable the Sheik's representative to report back to the Sheik that he had made friends in accordance with the Arab way of doing business? That is, in the totality of the circumstances, both the defendant and the Arab representatives understood that the defendant had been bought and that his support or at least assurance of continuing support were based at least in part upon the fact that he had received the money or was this a situation in which it was understood between the representative and the defendant that there was no corruption involved, that this was simply something which was made necessary in order to encourage the Sheik to go ahead with the project but that as between the representatives and the councilmen it was understood that there was no corruption involved?

A1358-59. In view of the jury's adverse determination that the payments were not for "friendship" but were to improperly influence defendants in the exercise of their official positions, the district court's substitution of its view of the evidence in deciding that *as a matter of law* there could be no predisposition represented an unfortunate usurpation of the jury's prerogative.

C.

The "contingency" of the hotel project, i.e., "the Arab mind"

The final factor, and the one considered "most important" by the district court in its assessment of the "overwhelm[ing]" inducement offered by the F.B.I. agents posing as the sheik's representatives, was the fact, as described by the district court, that defendants were "led to believe that if they did not accept the money, the project would not come to Philadelphia." 501 F. Supp. at 1200. The district court, in reviewing the entire undercover operation which has come to be known as ABSCAM, stated: "Perhaps the crucial aspect of the undercover operation was its emphasis upon 'the Arab mind,' the 'Arab way of doing business.' A constant theme of *the agents' representations was that their principals would not undertake any project unless first assured of the 'friendship' of the persons* with whom they were dealing." *Id.* at 1194 (emphasis added).

This conclusion suffers from the failure to cite to evidence that any such representation was ever made to or communicated to defendant Schwartz. We have found no such evidence. In fact, early in the meeting between Schwartz and Wald, Schwartz was told that Philadelphia had already been selected:

> WALD: Well, what I have been instructed to do and the purpose for ah my visits to Philadelphia is to firm up uh, what we consider to be a major invest-

> ment here and uh the gentleman cares to make a major investment here because he seems to like Philadelphia, and he has been told that it would uh be in his best interest to have an investment, uh, in an area where he, uh, would like to take up rather permanent residence and Philadelphia is it.

A690.

In an effort to point to evidence which would support the district court's conclusion that Schwartz was led to believe that if defendants did not accept the money the project would not come to Philadelphia, Schwartz refers to statements by Wald that his employer was interested in Philadelphia, had to be "happy", wanted to "take care of any potential problems long before they exist" and remarks regarding the need for "assurances." Schwartz has not, nor have we, found any statement in which Wald made the representation to Schwartz that the project was contingent on his acceptance of the money. While Wald may have made representations to others that the hotel project was contingent, we have not been referred to any evidence that such statements were communicated to Schwartz. If Criden were supposed to be the alleged conduit, he failed to testify to that effect since, notwithstanding the grant of defense immunity to Criden, neither the defendants nor the government called him as a witness.[12]

It may be that the district court, aware of similar representations with regard to the "Arab mind" which were made to other ABSCAM participants, interpolated them as to Schwartz. Whatever the explanation, since this was the "most important" factor to show that the ap-

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12. Prior to trial, the district court stated that the content of the defendants' off-camera discussions with Criden was of critical importance to defendants' entrapment defense. A102. After the close of the government's case-in-chief, the court granted Criden defense immunity to permit him to testify about these conversations. A996-1003.

peal to civic duty was too overwhelming an inducement for any public official to resist, once this factor is negated, the house of cards built upon it collapses.

With regard to Jannotti, there is no question that a reference to the "Arab mind" was made to him, and that Wald also represented that this "is the method of business that these people are use [sic] to, and that is how they conduct business . . . ." A860. See pp. 21-22 *supra*. Whether these statements can be construed as a representation that only if Jannotti accepted the money would the hotel come to Philadelphia is somewhat questionable. Such a conclusion is even more equivocal in light of the following colloquy which took place before the reference to the "Arab mind":

> JANNOTTI: Who could refuse a project like that?
>
> WALD: Nobody could, that's my point, alright, *but I've been told the City of Philadelphia is where this, ah, this construction project is going. I mean this is where he is going to be. This is where he wants it* . . . .

A852 (emphasis added). Later in the meeting Wald reiterated that "Philadelphia has already been sold, to the man." A876. *See also* A864, A880. Thus, even as to Jannotti, at most the evidence presents the basis for differing arguments to the jury as to the interpretation to be placed on the conversations.

In fact, the issue was presented to the jury. The district court instructed on this precise issue as follows:

> . . . depending on how you interpret the testimony, you might draw the inference that the net effect of the totality of the circumstances considering everything that the agents said in the course of these meetings the defendants were led to believe that unless they were willing to accept money and give assurances this hotel project would not be coming

> into Philadelphia . . . . [D]epending upon how you interpret what was said you could draw either conclusion, and it is up to you to decide which one is appropriate . . . .

A1355-56. The decision of the jury, adverse to the defendants, demonstrates its resolution of the differing inferences which might be drawn.

D.

Acceptance of the money by Schwartz and Jannotti

To summarize, the district court found that the acceptance of the money by Schwartz and Jannotti was insufficient evidence of their predisposition to take bribes because the government offered "such attractive inducements" as were bound to overwhelm. 501 F. Supp. at 1200. We conclude that the jury could have found that the evidence fails to show "such attractive inducements" as would overwhelm most honest, responsible public officials, no matter how deep-seated their civic duty. Thus, we return to the initial proposition, that the acceptance of the money itself may be sufficient to show predisposition.

In certain types of crimes, it is often possible for the government to show predisposition by proof of the defendant's prior convictions or his or her participation in similar transactions. *See, e.g., United States v. Ordner*, 554 F.2d 24, 28 (2d Cir.), *cert. denied*, 434 U.S. 824 (1977); *United States v. Lemons*, 470 F.2d 135 (3d Cir. 1972) (per curiam), *cert. denied*, 412 U.S. 929 (1973). Such evidence would be extremely difficult to produce in the case of acceptance of a bribe by a public official. Because such officials are often intelligent, educated and worldly, it is unlikely that they will accept money from those to whom they have not had "safe" introductions and who, because they are also implicated, are unlikely to report to the authorities. In addition, because

the crime has no direct victim, its occurrence leaves no public trail which cries for investigation. Since the ultimate factual determination is whether the defendant was "ready and willing to commit the crime if an opportunity should be presented," as distinguished from having been "corrupted by some overreaching or special inducement," *United States v. Watson*, 489 F.2d 504, 509 (3d Cir. 1973), the very acceptance of a bribe by a public official may be evidence of a predisposition to do so when the opportunity is presented.[13]

In resolving the issue of predisposition, the jury must determine the defendant's subjective intent. Except in unusual cases, intent can be proven only through circumstantial evidence. The factors ordinarily relevant to the jury's inquiry, particularly the defendant's words and mannerisms at the time of the offense, are generally available only through the testimony of one or more of the participants. The jury has no opportunity to hear the voice inflections or see the mannerisms of the participants. This case is unique in that through the videotape the jury could observe the entire criminal transaction and many of the events leading up to it. It could observe whether the defendants demurred or showed any reluctance when the money was handed to each of them. The jury could observe the amount of pressure, overt or tacit, if any, placed on the defendants to accept the bribes. In short, this jury had in its hands some of the most valu-

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13. Researchers have found it difficult to locate a case in which the defense of entrapment has been successfully interposed in prosecutions of public officials for accepting, agreeing to receive, or soliciting bribes. *See* Annotation, Entrapment to Commit Bribery or Offer to Bribe, 69 A.L.R.2d 1397, 1431 (1960). Defendants have cited to no such case, nor has our independent investigation uncovered one. This is to be contrasted with the occasional successful entrapment defense by those persons who have been enticed by public officials to make the payments. *See, e.g.*, United States v. Klosterman, 248 F.2d 191 (3d Cir. 1957). *But see* United States v. Bocra, 623 F.2d 281 (3d Cir.), *cert. denied*, 449 U.S. 875 (1980).

able tools possible with which to conduct its inquiry into the state of mind of each defendant, the crucial factor in an entrapment defense.

The Ninth Circuit recently reviewed the factors which must be considered in determining predisposition, and concluded that, "[w]hile none of the factors alone indicates either the presence or absence of predisposition, the most important factor, as revealed by Supreme Court and other decisions, is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement." *United States v. Reynoso-Ulloa*, 548 F.2d 1329, 1336 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978). The court stated, "We have found no case in which the defense of entrapment (as opposed to cases dealing with due process principles) was successful where the defendant had not indicated reluctance to engage in illegal activity." *Id.* at 1336 n.11.

The facts of this case are unlike any of the few in which the entrapment defense has been successful. *In United States v. Klosterman*, 248 F.2d 191, 193 (3d Cir. 1957), the government contacted a reluctant intermediary eleven times before he agreed to make the necessary introduction. The other defendant in *Klosterman* was, as the subject of an IRS investigation which had been continuing "for an unusual length of time," under anxiety and therefore "more susceptible" to the government's persuasion. *Id.* at 196. In *Sorrells v. United States*, the agent "lured" defendant by "repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War." 287 U.S. at 441. In *Sherman v. United States*, the defendant, after rebuffing numerous requests by the government agent, finally relented and sold drugs to the agent, who had played upon the defendant's sympathy by predicating his request upon his suf-

fering from lack of narcotics. 356 U.S. at 373. *See Wall v. United States*, 65 F.2d 993 (5th Cir. 1933). The situation here is obviously not analogous. Defendants in this case point to no statements or gestures which indicate any reluctance whatsoever to accept the proffered payments.

Although we have concentrated primarily on defendants' acceptance of the payments to demonstrate that predisposition was a jury issue, even were we to disregard certain other evidence relied on by the government to which defendants vigorously object, there was additional evidence which the jury may have credited in finding predisposition. Ellis Cook, a lawyer associated with Criden, testified that Criden told him that he had given money to Schwartz in return for Schwartz' introducing him to Jannotti. A607. This payment of what might be considered a "finder's fee" was made to Schwartz shortly after he had received the $30,000 payment from the agents. Schwartz' acceptance of a payment for introducing Criden to Jannotti, another public official, so that Jannotti could participate in a similar transaction could be considered by the jury to demonstrate that he was disposed to wrongdoing.[14] *See United States v. Dickens*, 524 F.2d 441, 445 (5th Cir. 1975), *cert. denied*, 425 U.S. 994 (1976) (defendant evidenced predisposition by "introduc[ing] his co-defendants to the prospective buyer").

A former law partner of Schwartz testified that Schwartz described the sheik's representative to him as being "a bright, capable individual who came prepared . . . ." A814. The jury might have inferred that Schwartz' failure to describe the representative as over-

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14. Other courts have recognized that a defendant's post-crime actions are acceptable as evidence from which an inference of predisposition can be made. *See, e.g.*, United States v. Jenkins, 480 F.2d 1198, 1200 (5th Cir.), *cert. denied*, 414 U.S. 913 (1973).

bearing was further evidence that Schwartz did not, even in retrospect, view the transaction as one in which his will had been overborne.

In addition to its jury instructions on the entrapment defense in general, the district court in its charge placed special emphasis on, and specifically placed before the jury for its consideration, some of the very questions of fact which that court later resolved differently than did the jury. Portions of that charge have been set forth above. When the district court advised the jury that it could find predisposition solely from the fact that a defendant was ready and willing to commit the offense for which he was currently on trial, the court cautioned that,

> in order to find predisposition based merely upon the fact that the defendant did in fact commit the crime he was induced to commit it is very important that you compare and analyze the issue of the alacrity with which a defendant joined the enterprise versus the extent of the inducement which was offered to him.

A1363.

After being carefully and specifically instructed on the significant factual issues in this case, the jury found the defendants guilty, thereby rejecting the entrapment defense. Its verdict represents a finding that, based on the totality of the evidence, including the observations by the jury of the actions, words, voice inflections and mannerisms of the defendants and the F.B.I. agents, the defendants were predisposed to engage in political corruption. The jury's verdict also represents a rejection of the notion that appellant Schwartz believed the $30,000 payment was a "consulting fee", as well as a rejection of the argument that the defendants were led to believe that the payment of money was simply to enable the representatives to report back to the sheik that they had made friends in accordance with the "Arab way" of do-

ing business. Finally, it represents a rejection of defendants' argument, accepted by the district court, that the defendants were led to believe that unless they took the payments the hotel project would not come to Philadelphia.[15] The dissent's passionate grandiloquent essay on judicial responsibility and courage simply glosses over the salient fact which is inescapable because of the videotape record: defendants accepted the money readily, unprotestingly, even casually, without ever once attempting to use their consummate political skill to say, as diplomatically as the circumstances required, "Thanks, but no thanks."

The ultimate factual decisions in an entrapment case must be left to the jury. Where, as here, the jury was uniquely equipped to inquire into the calculus of human interaction, a court should not interfere with its conclusions. We conclude that in determining that defendants were entitled to a judgment of acquittal on the ground of entrapment as a matter of law the district court impermissibly substituted its own determination of the credibility of witnesses, the weight of the evidence and the inferences to be drawn from the evidence for that of the jury.

IV.

DUE PROCESS

As an alternate ground for the entry of judgment of acquittal for both defendants, the district court held that the extent of government overreaching in this case amounted to a deprivation of the defendants' due process rights. In arguing for a reversal, the government does not contend that the district court erred in assum-

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15. In view of the jury's verdict, we need not consider the government's contention that the evidence of government inducement was insufficient to warrant submission of the entrapment issue to the jury.

ing that such a defense would be available in appropriate circumstances even to predisposed defendants or that it erred in articulating the legal standard by which to determine whether government conduct has passed the line of "fundamental fairness." Instead, the government argues that the district court erred in its application of the appropriate legal standard.

If the contours of the entrapment defense are imprecise, we have at least been able to make an effort to delineate them. A similar delineation of the conduct circumscribed by the due process defense is, at best, elusive. Part of the difficulty stems from the differing views by those who must interpret the constitutional standard as to what are "immutable and fundamental principles of justice." *See Rochin v. California*, 342 U.S. 165, 176 (1952) (Black, J., concurring). The other difficulty lies in a tendency for the due process defense to overlap with the entrapment defense, notwithstanding the Supreme Court's clear admonition that they are separate and distinct.

In *United States v. Russell*, the Supreme Court, while firmly rejecting the defendants' effort to define the entrapment defense in terms of the government's conduct rather than the defendant's state of mind, nonetheless accepted that in certain extreme cases "the conduct of law enforcement agents [may be] so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." 411 U.S. at 431-32. When the issue arose again, however, three years later in *Hampton v. United States*, the eight Justices who considered the case divided into three groups. The plurality opinion, written by Justice Rehnquist for three Justices, rested on the position that once predisposition has been shown, governmental misconduct can never be used to overturn a conviction, since the "remedy of the criminal defendant with respect to the acts of Government agents . . . lies solely in the defense of entrapment," and a predisposed

defendant is foreclosed from arguing entrapment. 425 U.S. 488-90. There is some language in that opinion which may be read to question the availability of any due process defense: "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." *Id.* at 490.

Two Justices, in an opinion written by Justice Powell, concurred in affirming the conviction by rejecting both the entrapment defense and the applicability of a due process defense to the facts shown. The dissenting opinion of Justice Brennan, for the remaining three Justices, focused on the "egregious" government conduct, and viewed the facts of the case as presenting an instance of the "sufficiently offensive" governmental conduct contemplated in *Russell*. *Id.* at 497.

Although the two concurring Justices whose opinion was pivotal agreed with the plurality that the government's supplying of contraband to one later prosecuted for trafficking in contraband does not constitute a *per se* denial of due process, 425 U.S. at 491 (Powell, J., concurring), they disagreed with the plurality view that "the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of the surrounding circumstances." *Id.* at 492. Thus, a majority of the Court, composed of the three dissenting Justices and the two concurring Justices, has rejected the position "that the defense of entrapment necessarily is the only doctrine relevant to cases in which the Government has encouraged or otherwise acted in concert with the defendant." *Id.* at 492 n.2. Justice Powell emphasized, however, that "the cases, if any, in which proof of predisposition is not dispositive will be rare," and that "[p]olice overinvolvement in crime would have to reach a demonstrable level

of outrageousness before it could bar conviction." *Id.* at 495 n.7.

We have in a prior opinion construed the language of *Russell* and *Hampton* to signify that "fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct was 'outrageous.'" *United States v. Twigg*, 588 F.2d 373, 379 (3d Cir. 1978). In *Twigg*, the first case since *Hampton* in which a defendant prevailed on a due process defense, a divided panel of this court held that "the governmental involvement in the criminal activities of this case has reached 'a demonstrable level of outrageousness.'" *Id.* at 380. In the case before us, the district court held that *Twigg* compelled a comparable result. The district court based this conclusion in large measure on the inducements to which the defendants had been subjected, holding that "it is neither necessary nor appropriate to the task of ferreting out crime for the undercover agents to initiate bribe offers, provide extremely generous financial inducements, and add further incentives virtually amounting to an appeal to civic duty." 501 F. Supp. at 1204. These were the same factors on which the district court relied in its determination that defendants had not been shown to be predisposed and, hence, were entrapped as a matter of law.

It is plain from the Court's opinion in *Russell* and the separate opinions in *Hampton*, however, that a successful due process defense must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense. The genesis of the entrapment defense lay in the Court's interpretation of legislative intent; "[s]ince the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable." *United States v. Russell*, 411 U.S. at 433 (footnote omitted). We must necessarily exercise scrupulous restraint before we denounce

law enforcement conduct as constitutionally unacceptable; the ramifications are wider and more permanent than when only a statutory defense is implicated.

We must be careful not to undermine the Court's consistent rejection of the objective test of entrapment by permitting it to reemerge cloaked as a due process defense. While the lines between the objective test of entrapment favored by a minority of the Justices and the due process defense accepted by a majority of the Justices are indeed hazy, the majority of the Court has manifestly reserved for the constitutional defense only the most intolerable government conduct. Here, the district court focused on the nature of the government inducements in finding a due process violation. Since we have already decided that these inducements were not so "exceedingly generous" as to negate the evidence of predisposition as a matter of law, it follows that they could not have been so overreaching as to violate the defendants' due process rights. Under the view of a majority of the Supreme Court, a finding of no entrapment does not preclude the availability of a due process defense; nonetheless, where, as here, the extent of government inducement necessarily was considered by the factfinder in its rejection of the entrapment defense, and we have held that issue as appropriately submitted to the jury, a successful due process defense must be predicated on other grounds.

The facts shown in *Twigg*, on which the district court relied, are not comparable to the government activity in this case. There, the government initiated and was actively involved in the operation of the criminal enterprise itself. As we summarized the facts:

> At the behest of the Drug Enforcement Agency, Kubica, a convicted felon striving to reduce the severity of his sentence, communicated with Neville and suggested the establishment of a speed laboratory. The Government gratuitously supplied

> about 20 percent of the glassware and the indispensable ingredient, phenyl-2-propanone. It is unclear whether the parties had the means or the money to obtain the chemical on their own. The DEA made arrangements with chemical supply houses to facilitate the purchase of the rest of the materials. Kubica, operating under the business name "Chem Kleen" supplied by the DEA, actually purchased all of the supplies with the exception of a separatory funnel. (The funnel was secured by Twigg at the direction of Kubica who was engaged in operating the laboratory.) When problems were encountered in locating an adequate production site, the Government found the solution by providing an isolated farmhouse well-suited for the location of an illegally operated laboratory. Again, there was no cost to the defendants. At all times during the production process, Kubica was completely in charge and furnished all of the laboratory expertise. Neither defendant had the know-how with which to actually manufacture methamphetamine. The assistance they provided was minimal and then at the specific direction of Kubica.

588 F.2d at 380-81. Thus, in *Twigg*, it was the DEA agents who "set up" the defendant, "encouraged him" and "provided the essential supplies and technical expertise." *Id.* at 381. In contrast, in this case the F.B.I. provided neither material nor technical assistance to the defendants; it merely created the fiction that it sought to buy the commodity — influence — that the defendants proclaimed they already possessed. In that respect, this case differs from *Twigg*, *Hampton*, and other drug-related cases, where the government is often involved on both the buying and selling sides of the transaction. *See Hampton v. United States*, 425 U.S. at 498 (Brennan, J., dissenting); *United States v. West*, 511 F.2d 1083, 1085 (3d Cir. 1975). This is also not a case

where the government's involvement in criminal activity has caused injury to third persons or extended beyond "the very activity for which the defendant[s] [were] prosecuted," factors emphasized by Judge Friendly in dictum in *United States v. Archer*, 486 F.2d 670, 675, 676-77 (2d Cir. 1973).

Defendants argue that both the initiation of the Philadelphia phase of the investigation and the subsequent approach to them constituted "outrageous" conduct in that the government had no reasonable basis to believe that such tactics would uncover criminal activity. We find this unpersuasive on both legal and factual grounds. The Second Circuit has recently indicated that there is no constitutionally-imposed requirement of reasonable suspicion before an undercover operation such as ABSCAM can be commenced. *United States v. Myers*, 635 F.2d 932, 941 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980). We have held, at least in the context of entrapment, that "it is *inconsequential* whether law enforcement officials did or did not act on *well-grounded suspicion* that the defendant was engaging in wrongdoing, or whether they had *probable cause* for approaching the defendant." *United States v. Silver*, 457 F.2d 1217, 1220 (3d Cir. 1972) (emphasis in original; footnote omitted). Where the conduct of the investigation itself does not offend due process, the mere fact that the investigation may have been commenced without probable cause does not bar the conviction of those who rise to its bait.

In any event, there is no evidence that the government targeted either Schwartz or Jannotti in advance. Their names emerged from discussions with Criden on whom the government relied for "Criden's proven ability to enlist corrupt politicians," particularly those with a connection to the Philadelphia area. Brief for Appellant at 49. Whether or not Criden had a reasonable basis for representing that Schwartz and Jannotti would be willing to "take a hot stove," A499, such representations pro-

vided the government with a reasonable basis for the initiation of the bribe offers made to them. As the district court found, "Criden assured the agent that, unless each individual agreed in advance to accept the money, no meeting between the representative and that individual would be arranged." 501 F. Supp. at 1197. The government's use of a middleman to bring forward corruptible officials refutes defendants' contention that they were unfairly targeted in advance by the government investigators.

The due process defense has been raised primarily in cases where defendants are accused of involvement in narcotics traffic. No federal judge can be unaware of the vastness of government undercover operations which seek to apprehend those engaged in that reprehensible trade. As Justice Powell commented in the dispositive opinion in *Hampton*, 425 U.S. at 495-96 n.7:

> One cannot easily exaggerate the problems confronted by law enforcement authorities in dealing effectively with an expanding narcotics traffic . . . which is one of the major contributing causes of escalating crime in our cities . . . . Enforcement officials therefore must be allowed flexibility adequate to counter effectively such criminal activity.[16]

Official corruption, in the form of bribery and extortion involving public officials, can, like the narcotics sales involved in *Hampton*, easily elude detection, since both parties to the transaction have an interest in concealment. Indeed, bribery may be even more difficult to un-

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16. In *Twigg*, we distinguished *Hampton*, where the convictions were upheld, on the ground that *Hampton* was "concerned with the sale of an illegal drug, a much more fleeting and elusive crime to detect than the operation of [the] illicit drug laboratory [involved in *Twigg*]." We recognized that in "such a situation the practicalities of combating drug distribution may require more extreme methods of investigation, including the supply of ingredients which the drug ring needs." 588 F.2d at 378 (footnote omitted).

cover than drug deals. *United States v. Myers*, Nos. CR80-00249, CR80-00253, CR80-00291, slip op. at 62-63 (E.D.N.Y. July 24, 1981). A determination of what undercover operations are necessary to discover and expose corruptible public officials must be left, in the first instance, to that branch of government which has the responsibility for maintenance of public order. Unless the behavior of the F.B.I. agents rose to that level of outrageousness which would bar conviction, the conduct of agents of the executive branch who must protect the public from crime is more appropriately considered through the political process where divergent views can be expressed in the ballot box.

The district court's distaste for the F.B.I.'s ABSCAM operation is evident from its opinion. In referring to "the extent to which the agents were prepared to go", the district court relied on the actions of F.B.I. agents in other phases of the ABSCAM operation which related to other defendants having no connection with Schwartz and Jannotti. 501 F. Supp. at 1194-95. We have been clearly instructed, however, that the due process inquiry must focus only on the actions of the F.B.I. insofar as they related to Schwartz and Jannotti. Thus, in his opinion in *Hampton*, Justice Rehnquist remarked, "The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the *defendant*." 425 U.S. at 490 (emphasis in original). *See United States v. Payner*, 447 U.S. 727, 737 n.9 (1980). We do not, in this case, pass upon the nature of the F.B.I.'s conduct as to any defendant other than the two who are before us on this appeal. As to them, the impropriety of government conduct on which the district court relied in granting the motions for acquittal was limited to the evidence of government instigation and inducement, which, as we have already indicated, did not reach the "demonstrable level of outrageousness" necessary to compel acquittal.

In reversing the district court's judgment of acquittal on the ground of a due process violation, we do not place our imprimatur either of approval or disapproval on the government's conduct. As citizens, we have differing views of the necessity or advisability of the entire ABSCAM project. As judges, however, we rule only on whether the limits which the Constitution places on another branch of government have been exceeded. We find that the government's conduct as to these two defendants did not violate their due process rights, and that therefore the district court's judgment of acquittal on this ground must be reversed.[17]

V.

MANUFACTURED JURISDICTION

The final basis for the district court's judgment of acquittal was that "the circumstances relied upon to establish federal jurisdiction over the offenses charged were artificially created by the Government in an attempt to exceed the proper scope of federal law enforcement." 501 F. Supp. at 1205. In support of an acquittal on this basis, the district court relied on the rationale used in *United States v. Archer*, 486 F.2d 670 (2d Cir.

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17. Judges Adams, Hunter and Garth agree that United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), is distinguishable from the present case on its facts. They would go one step further, however, and directly overrule the *Twigg* decision. They believe that United States v. West, 511 F.2d 1083 (3d Cir. 1975), relied on by the majority in *Twigg*, the district court below, and the appellees here, was implicitly reversed by Hampton v. United States, 425 U.S. 484 (1976), and that unless further guidance is given in this area, district courts, in a faithful attempt to apply *Twigg* and *West*, will continue to reach results that cannot be reconciled with the teaching of the Supreme Court in *Hampton*. In this day of heightened criminal activity, the federal judiciary must be cautious not to exercise a "veto" — especially, as in this case, a constitutional veto — "over law enforcement practices of which it [does] not approve." United States v. Russell, 411 U.S. 423, 435 (1973).

1973). The holding in *Archer* is more limited than the concept for which it was cited by the district court. In reversing convictions under the Travel Act, the *Archer* court held that, as a matter of statutory construction, the use of interstate and foreign telephone facilities did not suffice to bring the defendants within that statute. The statutory infirmity was that the three interstate phone calls relied upon to establish jurisdiction under the Travel Act were insufficiently related to the criminal activity charged or had been arranged by the federal agents for the sole purpose of providing the necessary federal nexus. Under those circumstances, the Second Circuit held that the phone calls were insufficient to transform a "federally provoked incident of local corruption into a crime against the United States." 486 F.2d at 683. The court explicitly declined to dismiss the prosecution as an abuse of federal power, although it made plain that its holding reflected its misgivings as to whether the facts showed any basis for a substantial federal interest.[18]

In contrast, in this case, we have already sustained jurisdiction under the Hobbs Act because of the substantial federal concern in protecting interstate commerce from conspiracies such as that at issue here, and the district court held that the elements of the RICO charge as to Schwartz had been properly established. 501 F. Supp. at 1186-87. These holdings necessarily indicate the sufficiency of the federal interest presented under the facts here.

The narrow reach of *Archer* can also be gleaned from the Second Circuit's own construction of it in *Unit-*

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18. When *Archer* came before the Second Circuit a second time, Judge Friendly, the author of both opinions, stated that the ground for the decision in *Archer* "was that there had been no sufficiently meaningful use of [interstate telephone] facilities in connection with the essentially local crime committed by Archer . . . ." Archer v. Commissioner of Correction, 646 F.2d 44, 45 (2d Cir. 1981).

ed States v. Gambino, 566 F.2d 414, 419 (2d Cir. 1977), *cert. denied*, 435 U.S. 952 (1978). In *Gambino*, the court sustained the conviction of defendants under, *inter alia*, the Hobbs Act and RICO over the objection of defendants that jurisdiction had been contrived by the F.B.I.'s creation of an undercover garbage collection business for the purpose of trapping the suspected racketeers. The court pointed out that in *Archer* the phone calls "were purposely made in order to create an interstate element for what would otherwise have been merely a local crime." *Id.* at 419. Although the F.B.I.'s garbage business in *Gambino*, unlike the hotel project involved here, actually engaged in interstate commerce by obtaining equipment from Texas and arranging to dump its garbage in New Jersey, the court in *Gambino* indicated that its decision upholding jurisdiction did not turn on that fact, stating that "[s]ince the garbage collection business in the Bronx was sufficiently related to interstate commerce . . ., it was really unnecessary for the federal agents actually to buy machinery or to dump garbage outside the state. The ruse itself was not objectionable, and the allegedly spurious out-of-state involvement was in any event, irrelevant." *Id.*

We view the district court's judgment of acquittal on the grounds of manufactured jurisdiction as essentially an amalgam of its determinations that jurisdiction under the Hobbs Act was insufficient and that the entire ABSCAM operation involved federal overreaching. Since we have already found that neither of these holdings can be sustained, we believe that the circumstances of this case do not warrant acquittal on the independent basis of manufactured jurisdiction.[19]

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19. In light of our holding, we express no opinion on whether a finding of manufactured jurisdiction could support a judgment of acquittal, as ordered by the district court in this case, or can be used only as the basis for dismissal of the indictment for lack of jurisdiction, which was the procedure followed in *Archer*.

VI.

CONCLUSION

In summary, we have closely examined each of the bases on which the district court reversed the defendants' convictions, the relevant evidence, and the applicable law. We conclude (1) there was jurisdiction under the Hobbs Act; (2) the evidence of defendants' predisposition was sufficient to support the jury's conclusion of no entrapment; (3) the conduct of the government agents as to Schwartz and Jannotti did not violate their due process rights; and (4) there was no basis on which to direct an acquittal on the ground of manufactured jurisdiction. For the foregoing reasons, we will reverse the district court's order of November 26, 1980 dismissing Count III of the indictment and granting judgments of acquittal, and direct reinstatement of the jury's verdict.

ALDISERT, *Circuit Judge*, Dissenting, with whom Judge Weis joins, with the exception of Part VII.

The division of the court in this extremely important entrapment case reflects fundamental and irreconcilable differences in the values attached to two primary integrants of the American tradition of justice:

> To what extent should federal judges assume the responsibility for protecting American justice traditions, and to what extent should judges delegate this responsibility to the jury?
>
> To what extent should federal judges endorse tactics of the kind used by the Federal Bureau of Investigation in this case?

The majority opinion reads like a paean to the FBI for its conduct in this case; but as an American citizen and as a federal judge, I find that conduct revolting. I agree completely with Justice Holmes:

> It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.[1]

The FBI has a long and proud history. It has earned the admiration and respect of the American people for its efficiency and fairness. The accomplishments of its agents have been dramatically portrayed in books and on the screen. But like all human institutions it is subject to the frailties of man. Under its distinguished director William H. Webster the instances in which it has been faulted for its conduct indeed have been few in number,

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1. *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

and in that we may take great satisfaction. One reason for the low incidence of aberrational conduct has been the sense of responsibility of the Bureau's men and women. An additional restraint has been the knowledge that the courts, in administering the criminal justice system, would scrutinize the agents' activities. The chief deterrent, however, perhaps is the resolve shared by agents, judges, and the public that the FBI not become an American version of the secret police so infamous in many countries.

I.

A.

We judges come to our robes bearing the stigmata of our respective experiences. I readily confess that being born to an immigrant father and reared in a Western Pennsylvania community peopled largely by European immigrants and their children placed indelible impressions on me at an early age. The religious and political refugees who came to this land at the turn of the century had much to fear from the old country's secret police, but one of the greatest abhorrences was the *agent provocateur*, a person employed to pretend sympathy with members of a group and incite them to illegal action, and thus to expose them to apprehension and punishment. From my childhood I remember stories told in broken English by gnarled refugees from Russia, the Ukraine, and Poland, recounting in graphic detail the abuses inflicted upon them in peasant villages by the Ochrana, the secret police of the Czar.[2] Lacking the personal drama, but nevertheless equally authoritative,

2. A most infamous *agent provocateur* was Azeff, "to whom the enduring reputation of the Ochrana owes its deeper shades of infamy." Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 Yale L. J. 1091, 1092 n.8 (1960)(quoting Rowan, The Story of Secret Service 374 (1937)).

were academic studies and news accounts of the later operations of the OGPU, the dreaded secret police of the Stalinist era.

The apogee of government artifice, guile, and deceit was reached with the formation of the Gestapo in Nazi Germany. The story of the Holocaust is an account of the *agent provocateur* at his ruthless worst. It is an account of fraudulent representations to determine the identity of Jews, of cajoling incrimination of father by son and son by father, of lies about the purpose of detention and detention camps, "*Arbeit Macht Frei*" ("Work Will Set You Free"), and of gas chambers disguised as shower rooms. Such spectres cannot be easily exorcised.

The Gestapo were the consummate users of the "honey pot," a technique government witness Melvin Weinberg proudly described as the technique the government utilized in this case.[3] The FBI employed the honey pot through a secret agent who, by ostentatiously flashing and giving away wads of money, would attract both the wary and the unwary, the scrupulous and the unscrupulous. Having attracted, the honey pot would serve also to capture those who were willing, that is, predisposed, to make the flight to the honey in the first place, as well as those who would have been unwilling, but who made the flight to the pot only because of the strength of the lure. But this trap was particularly selective: the operators of this honey pot personally selected those who could share the sweet stuff. The party was by invitation only; when the guests came to the pot it was not necessary for them to ask for a sample; rather, their mouths were opened for them and the honey poured down their gullets.[4]

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3. Weinberg Cross Examination, A254.

4. An analogy by Washington, D.C., lawyer William Hundley illustrates my point:

> "It's one thing to take a street where hookers work, dress a policewoman up as a hooker and put her out there, . . ." It's

Moreover, it is no longer open to question that the ABSCAM operation was deliberately leaked to the press. *See United States v. Criden*, 633 F.2d 346, 348 (3d Cir. 1980), *cert. denied sub nom. Schaffer v. United States*, 449 U.S. 1113 (1981). I agree with Professor Paul Chevigny of New York University:

> [T]he power to tempt into crime and then to leak the story is a particularly potent combination. Once the authorities have selected the target of their investigation, they can make the charge "stick" in the press, regardless of how much temptation was offered, regardless of whether the courts would recognize a defense, and regardless of the reason the victim was chosen.[5]

NOTE — *(Continued)*
something else entirely, . . . "to take Bo Derek and throw her naked into the Notre Dame locker room."

Quoted in *Some Questions of Ethics*, Newsweek, Feb. 18, 1980, at 32.

5. Chevigny, *A Rejoinder*, The Nation, February 23, 1980, at 205. Professor Chevigny also expressed concern about the government's power to select its targets:

> As stories have emerged over the past fifteen years about the practices of law-enforcement agencies in offering opportunities for crime (whether they amount to entrapment in the technical sense or not), a chief concern has been that the focus was on "political" people. That used to be a codeword for Catholic pacifists, the Vietnam Veterans Against the War, Black Panthers and assorted others who were convicted or acquitted, according to the vicissitudes of the venue and the criminal law, for crimes against the state in which police inducements were involved. For better or worse, the code word now extends to Republican and Democratic politicians. But the danger remains the same: the power to offer a temptation to crime is the power to decide who shall be tempted. It can be and often has been used as a way for the Government to eliminate its enemies, or for one faction in Government to get rid of another. Put simply, the question raised by actions like Abscam is: Can we leave it to the investigators to decide which politician to tempt?

Id. at 204-05.

To the Department of Justice, its operation was a taste of honey; to me, it emanates a fetid odor whose putrescence threatens to spoil basic concepts of fairness and justice that I hold dear.[6] That the FBI has earned high praise for its performance in the traditional discharge of its duties should not immunize the secret police tactics employed in its ABSCAM operation from appropriate and vigorous condemnation. If we fail to correct when necessary, we do no favors to those who have erred.

B.

The majority allow the entrapment question in this case to be resolved by a lay jury. As staunchly as I believe that the jury, reflecting the conscience of the community, should be society's instrument for resolving controverted facts once a minimum legal threshold has been established, I stoutly believe also that the jury, untrained in the law, should never be called upon to design and construct that threshold.[7] This is precisely

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6. Describing another era, the historian Sir Erskine May eloquently declared:

> Nothing is more revolting to Englishmen than the espionage which forms part of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gayety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency. Rulers who distrust their own people must govern in a spirit of absolutism; and suspected subjects will be ever sensible of their bondage.

2 E. May, Constitutional History of England 275 (1863).

7. *See e.g., Hollinger v. Wagner Mining Equip. Co.*, ___ F.2d ___, No. 81-1359 (3d Cir. Dec. 22, 1981)(Aldisert, J., dissenting); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). In *Brokers Title Co. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174 (3d Cir. 1979), we stated:

> Many sins in the law have at times been swept under a jurisprudential rug in the guise of fact finding, but neither justice

what the majority have done here. They permit the jury to perform a responsibility which by law and by formal commission belongs to the judges of the Third Article.[8]

Defining the precise division of authority in the judge-jury relationship is always a sensitive and delicate responsibility. Where the defense of entrapment is interposed, however, the responsibility is appreciably intensified. The mere submission to the jury may present the jury with a Hobson's choice as to the defendant, because the entrapment defense requires the defendant to admit the commission of deeds which, but for their inducement by the government, would constitute the commission of a crime. A lay jury conditioned by years of published criticism of judges "who let the guilty go free on a technicality" may well be reluctant to give effect to the defense.

In our American legal tradition the jury has but one function — to resolve controverted facts. I defend this simple thesis: There was not one fact, controverted or otherwise, or resulting inference that allowed the submission of the entrapment issue to the jury. Although one can fashion a lengthy and tortuous argument that, under the facts here, the entrapment issue was properly submitted to the jury, I am not willing to have basic precepts of the American legal tradition so papered by reams of irrelevancies that only a jurisprudential masquerade is left for the viewing. I would hold, based on all

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NOTE — *(Continued)*

nor reason, neither public policy nor logic, compels us to do so here. When questions of law dominate uncontroverted material facts, resort to fact finding from a congeries of irrelevant evidence is unnecessary.

Id. at 1177.

8. The expression is that of Professor Bernard J. Ward of the University of Texas. Ward, "The Judges of the Third Article," unpublished luncheon address, Judges' Luncheon, 36th Annual Judicial Conference, Third Judicial Circuit of the United States, Pittsburgh, Pa., October 15, 1973.

the testimony, crediting specially that of the government and drawing all reasonable inferences in its favor, that there was inducement as a matter of law and that a reasonable jury could not conclude that the government proved beyond a reasonable doubt that the defendants were predisposed to commit the crime. Under these circumstances, there was no jury question. Under these circumstances, there were no controverted facts for the jury to resolve. Under these circumstances, "[i]t is as fatal as it is cowardly to blink facts because they are not to our taste."[9]

In my approach to this case, I acknowledge that transgressors must be punished for conduct that violates legal standards, but I place a restriction on this abstract theory: those who receive society's commission to go forth and capture transgressors may not themselves transgress. A free society can exist only to the extent that those charged with enforcing the law respect it themselves. "There is no more cruel tyranny than that which is exercised under cover of the law, and with the colors of justice."[10] The law enforcers may themselves offer inducements to transgress *if, and only if,* the persons so induced were predisposed to violate the law and the offered inducements provided only the opportunity to act on their predispositions. A society cannot long remain free if we permit the law enforcer to offer more

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9. J. Tyndall, *Fragments of Science* in Science and Man.

10. Montesquieu, *De l'Espirit des Lois* (1748).

Dissenting in *Olmstead v. United States*, 277 U.S. 438 (1928), Justice Brandeis stated:

> If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution.

Id. at 485 (Brandeis, J., dissenting).

than opportunity for transgression; a free society cannot and will not endure if it permits law enforcers to select individuals arbitrarily, and then to proceed by deception to persuade, cajole, entice, and implant a law-breaking disposition that was not theretofore present. Just as we will not admit into evidence a statement obtained by police methods that overbear or overwhelm the will, even if it admits to the commission of a crime, *Fikes v. Alabama*, 352 U.S. 191 (1957); *Brown v. Mississippi*, 297 U.S. 278 (1936), we refuse to deem as an offense against society conduct resulting from ideas which police deliberately implanted in the mind of the actor, *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).

Federal public policy, and, indeed, basic social policy, dictate that it is better to let a technical transgressor go free than to allow federal law enforcement officials to manufacture crime that entraps the unwary innocent. The predicate of this public policy against entrapment is threefold. First, it recognizes the awesome power of the financial and personnel resources at the disposal of federal law enforcement authorities. Second, reflecting the Judeo-Christian understanding that weakness has inhered in mankind since the days of Adam, it appreciates that even the most morally scrupulous members of society can be persuaded to breach behavioral standards if presented with sufficiently tempting inducements. Third, it acknowledges that a line can be drawn that will permit the proper use of government resources to identify and prosecute the wrongdoer and at the same time serve as an instrument to prevent abuse of those resources. If the government presents temptations, small or large, but the defendant is predisposed to succumb to them, then the government's conduct is usually permissible;[11] if the defendant is not predisposed, then the government's conduct is beyond the pale.

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11. This court has held that, as a matter of fundamental fairness, where the government's involvement in criminal activities at-

The majority and I differ upon where to draw that line and upon the relative competences of judges and juries to protect society from secret police excesses. The majority's superbly crafted essay selects assorted legal precepts and then unerringly extends "a maxim or a definition with relentless disregard of consequences to 'a dryly logical extreme.' "[12] It bids fealty to Judge McSherry's view, that "[o]bviously a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results."[13] I reject this process, whether one calls it *Begriffsjurisprudenz*, mechanical jurisprudence, or slot machine justice. I believe that the proper test of a legal rule is the extent to which it contributes to the establishment and preservation of a social environment in which "the quality of human life can be spirited, improving and unimpaired;"[14] and that law must be judged by the results it achieves, not by the niceties of its inherent structure. "[I]t must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictures with which its rules proceed from the dogmas it takes for its foundation."[15]

I refuse to proceed as if no important social issue were involved in this case which implicates both the wrongdoing of city public officials and the questionable activities of federal police officials. I believe that we are confronting an extremely sensitive intersection between morals and positive law, which demands that the judici-

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tains a demonstrable level of outrageousness, prosecution for the crime will be barred even if the defendant is shown to have been predisposed. *United States v. Twigg*, 588 F.2d 373, 380-82 (3d Cir. 1978).

12. *Hynes v. New York Cent. R. Co.*, 231 N.Y. 229, ___, 131 N.E. 898, 900 (1921) (Cardozo, J.).

13. *Gluck v. Baltimore*, 81 Md. 315, ___, 32 A. 517, 517 (1895).

14. *Croker v. Boeing Co.*, 662 F.2d 975, 1002 (3d Cir. 1981) (in banc) (Aldisert, J., concurring and dissenting) (quoting Jones, *An Invitation to Jurisprudence*, 74 Colum. L. Rev. 1023, 1030 (1974)).

15. Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 605 (1908).

ary assume rather than shirk responsibility. To paraphrase Judge Walter V. Schaefer, the philosophical difference that divides this court depends upon a judge's unspoken notions about the role of the courts. If he or she views the role of the court as a passive one, he or she will be willing to delegate the responsibility for unpopular issues to the jury and not care greatly what the result may be. If he or she views the court as an instrument of society designed to reflect in its decisions the highest values of the American legal tradition, he or she will be more likely to risk public disapproval and to measure an unpopular cause against the highest ideals and aspirations of the time.[16]

The rights conferred upon our society by judges of the Third Article emanated from cases in which the defendants were unpopular and generally regarded as transgressors — Dollree Mapp, Danny Escobedo, and Ernesto Miranda quickly come to mind. In each case, a court, not a jury, drew the line of demarcation between permissible and impermissible police conduct to insure that enforcers of society's laws would not violate established moral frontiers while exercising their stewardship; it was federal judges, unmindful of editorials and broadcast plaudits, who chose to stand tall and unbending. Like District Judge John P. Fullam, those federal judges were unwilling to relegate the formulation of these protections to the "coquetry of public opinion, which has her caprices"[17] in the jury room.

II.

Let me clear the air as to what I perceive case law to regard as legitimate and, therefore, permissible, undercover police work, and that which goes beyond the pale.

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16. Schaefer, *Precedent and Policy*, 34 U. Chi. L. Rev. 3, 23 (1966).

17. Edmund Burke, Letter to Thomas Burgh, New Year's Day, 1780.

In the permissible category I put all undercover activity that searches out contemplated or ongoing criminal conduct and even results in actual participation in the illegal enterprise.[18]. In this same category I would justify an agent's inducement of others to engage in crime, so long as there is proof of predisposition by the others to participate in the illegal activity. Where, as here, there is absolutely no proof that the defendants had any disposition to commit an illegal act but for the government's inducement, however, then the government's actions are impermissible, and the defense of entrapment is available as a matter of law — and it is for a judge and not a jury to blow the whistle on the improper conduct.

The entrapment defense thus implicates two interrelated but discrete elements: inducement and predisposition. *See Hampton v. United States*, 425 U.S. 484 (1976); *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932). Entrapment is a "relatively limited defense," *Russell*, 411 U.S. at 435, that "focus[es] on the intent or predisposition of the defendant to commit the crime." *Id.* at 429. When the entrapment issue is joined, the burden is on the government "to disprove the whole defense beyond a reasonable doubt." *United States v. Watson*, 489 F.2d 504, 510 (3d Cir. 1973); *see Government of the Virgin Islands v. Cruz*, 478 F.2d 712, 717 & n.5 (3d Cir. 1973).

The defense is a matter of statutory interpretation, rooted in the notion that Congress does not intend to punish a defendant who has committed all the elements of a proscribed offense if he was induced to commit them by the government. *Russell*, 411 U.S. at 433-35; *Sorrells*, 287 U.S. at 445-51. The prosecution is not defeated by proof that the government has participated in

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18. This assumes that the government participation in the crime is not so extensive and outrageous as to constitute a violation of fundamental fairness. *Twigg*, 588 F.2d at 380-82.

deceit or merely provided an opportunity or a facility to commit the offense; the defense of entrapment is available only when "the Government's deception actually implant[ed] the criminal design in the mind of the defendant." *Russell*, 411 U.S. at 436. In the felicitous phrase of Chief Justice Earl Warren, "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Sherman*, 356 U.S. at 372. The crucial question, then, is whether the defendant was induced to commit the offense by agents of the government or predisposed to commit like offenses whenever the opportunity arose. We have recognized, however, that evidence of inducement may be highly probative of predisposition. Judge Rosenn has expressed it succinctly: "[T]he stronger the inducement, the more likely that any resulting criminal conduct of the defendant was due to the inducement rather than to the defendant's own predisposition." *Watson*, 489 F.2d at 511. *See also United States v. Burkley*, 591 F.2d 903, 915-16 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979).

Chief Justice Warren emphasized that the function of law enforcement is the prevention of crime and the apprehension of criminals, and "that function does not include the manufacturing of crime." *Sherman*, 356 U.S. at 372. A review of the evidence in this case persuades me that the agents of the FBI were consummate manufacturers of crime. They built the plant, they designed the machinery, they operated it, and they covertly solicited the defendants to be customers of their product. It is difficult to conceive of a stronger case of inducement by the government.[19] Yet the majority observe, with an almost casual tone:

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19. The opinion of the court below summarized applicable inducement concepts as follows:

> Under the general label "inducement" the reported decisions have included such diverse elements as suggesting that the crime be committed, providing some or all of the instrumentalities or facilities needed to complete the crime, actively partici-

> In view of the jury's verdict, we need not consider the government's contention that the evidence of government inducement was insufficient to warrant submission of the entrapment issue to the jury.

Majority Opinion typescript at 54 n.15. Faced with the uncontroverted facts here, the government's contention, offered for the first time at oral argument, that no *prima facie* case of inducement was presented, does not reflect sober analysis or serious appellate argument but a chatter of irresponsible frivolity. Studiously avoiding the impression that their product was illegal, the FBI acted efficiently to ensnare their arbitrarily selected customers within the ten days the local task force had been allotted.[20] Their technique was a page torn from Aleksandr Solzhenitsyn's vivid description of the dreaded Soviet Blue Caps: "Just give us a person — and we'll create the *case*!"[21] I am persuaded that this case presents a classic model of the type of entrapment that our society emphatically condemns.

III.

Presented with a mere prima facie case of government inducement or lack of a defendant's predisposition, the trial court is obliged to submit an entrapment issue to the jury for a factual determination. Where the evi-

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> pating in the commission of the crime, providing varying degrees of incentives, providing varying degrees of persuasion or even coercion, or a combination of these ingredients.

United States v. Jannotti, 501 F.Supp. 1182, 1190 (E.D.Pa. 1980). I agree with Judge Fullam that some or all of these were established by the evidence in this case.

20. The ABSCAM show was to play only 10 days in Philadelphia. The operation had to move to another location if fish were not caught. *See* the record in *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980), *cert denied sub nom. Schaffer v. United States*, 449 U.S. 1113 (1981).

21. A. Solzhenitsyn, The Gulag Archipelago 146 (1973).

dence of inducement is overwhelming and the defendant's lack of predisposition so evident that it points to only one reasonable conclusion, however, "the question may be decided as a matter of law, just as any other factual issue admitting of only one conclusion." *United States v. Klosterman*, 248 F.2d 191, 195 (3d Cir. 1957). *See Sherman*, 356 U.S. at 373-76.

Our role in reviewing the evidence is not to determine whether the defendants' conduct amounted to an offense under the statute; yet the majority's discussion of the evidence is oriented to precisely that end. As such, the discussion is irrelevant to what I perceive to be the sole issue before us: did the government present evidence sufficient to sustain a jury finding that, beyond a reasonable doubt, the defendants were predisposed to commit the offenses?

A.

I examine first the threshold issue of inducement. ABSCAM was conceived by the FBI for one purpose: to seek out public officials vulnerable enough to accept the lush gifts dangled before their eyes by purported representatives of a fictional Middle Eastern potentate. They enlisted as their chief executive officer an old friend, convicted career swindler Melvin Weinberg, who not only was given probation by a federal district court through the intervention of the FBI, but also was paid extraordinarily well for his services. They entered Philadelphia by seeking introductions through attorney Howard Criden, who had extensively participated in corrupt transactions for cash rewards and eagerly sought opportunities for more of the same, and they further tempted him by dangling the lure of potential legal fees. FBI agent Michael Wald, in the guise of Abdul Enterprises "expeditor" Michael Cohen, advised Criden that the sheik was interested in building a hotel in Philadelphia, and perhaps in other investments in the area, but

only if he could be assured of having the friendship of titled municipal government officials.

Wald eagerly sought to deal with every significant official whom Criden and others named. Criden and Wald lured Schwartz and Jannotti not only with offers of cash payments to them but also with the prospect of a multi-million dollar investment in downtown Philadelphia. It is reasonable to conclude, indeed it is the only reasonable conclusion, that the councilmen would be desirous of such an injection of funds into the city's economic arm, because it would provide jobs and expand the city's tax base. They were repeatedly assured that the project would be "legitimate." In addition, "the very amounts of the bribes were, to paraphrase the language of the court in *Scriber v. [United States,* 4 F.2d 97, 98 n.4 (6th Cir. 1925)], 'a substantial temptation to a first offense.' " *United States v. Jannotti,* 501 F.Supp. at 1200.

These defendants were led to believe that the Philadelphia investment was entirely contingent on the sheik's confidence, in accordance with the dictates of "the Arab mind," that he had "friends" with titles in city government. These representations were not only made by Wald directly to Jannotti, as the majority admit, but also to Schwartz via a Tinker to Evers to Chance play: Wald to Criden to Schwartz. The majority blithely ignore the heart of the ruse devised by the FBI entrepreneurs and naively suggest that since the record does not disclose an actual communication, the basic premise underlying the scam in ABSCAM was not communicated to the very sophisticated president of the Philadelphia City Council by those who sought to enlist him.[22] It was

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22. The majority argue as to Schwartz:

> It may be that the district court, aware of similar representations with regard to the "Arab mind" which were made to other ABSCAM participants, interpolated them as to Schwartz. Whatever the explanation, since this was the "most important"

Wald, the government agent — not Criden, not Schwartz, not Jannotti — who introduced this concept, which was summarized by Judge Fullam:

> Perhaps the crucial aspect of the undercover operation was its emphasis upon "the Arab mind,"

NOTE — *(Continued)*

factor to show that the appeal to civic duty was too overwhelming an inducement for any public official to resist, once this factor is negated, the house of cards built upon it collapses.

Majority Opinion typescript at 48-49.

The majority contend that, as to Jannotti:

> [T]here is no question that a reference to the "Arab mind" was made to him, and that Wald also represented that this "is the method of business that these people are used to, and that is how they conduct business . . . ." A860. . . . Whether these statements can be construed as a representation that only if Jannotti accepted the money would the hotel come to Philadelphia is somewhat questionable. Such a conclusion is even more equivocal in light of the following colloquy which took place before the reference to the "Arab mind":
>
> > JANNOTTI: Who could refuse a project like that?
> >
> > WALD: Nobody could, that's my point, alright, *but I've been told the City of Philadelphia is where this, ah, this construction project is going. I mean this is where he is going to be. There is where he wants it* . . . .
>
> A852 (emphasis added). Later in the meeting Wald reiterated that "Philadelphia has already been sold, to the man." A876. *See also* A864, A880. Thus, even as to Jannotti, at most the evidence presents the basis for differing arguments to the jury as to the interpretation to be placed on the conversations.

Id. at 49.

The majority's argument as to Jannotti goes to whether the offense of *extortion* was made out, an issue not controverted in entrapment. But their contention does not refute the applicability of this evidence to predisposition. Simply stated, Jannotti's response, no matter how interpreted, has relevance to the issue of his predisposition, a relevance congruent with the "Arab mind" scenario to which he had been exposed.

> "the Arab way of doing business." A constant theme of the agents' representations was that their principals would not undertake any project unless first assured of the "friendship" of the persons with whom they were dealing. They were impressed with titles, with persons in official positions of power and influence. Their concept of "making friends" was that money had to be paid. At least insofar as the Philadelphia aspects of the investigation were concerned, there was no suggestion that the putative sheik required or expected any violation of the law in exchange for the payment; he merely wished to be assured that he had "friends" in high places.

Id. at 1194. Finally, neither defendant volunteered for the sheik's "friendship," nor did they actively seek or suggest that cash payments would be appropriate. They were actively recruited and solicited to accept large amounts of money, and they did.

It is in the context of inducement that the stated purpose for the payments is relevant. The threshold issue in entrapment is not what constitutes the crime of bribery or extortion but what is the extent of the inducement offered by the government agents. The statements of the defendants that they would aid a "legitimate" project and the government agents' failure to disabuse the defendants of their expressed belief in the plan's legitimacy — while they nevertheless pressed money on the defendants — are significant in appraising the extent of the government's importunities.

The proof of inducement is so compelling that ordinarily I would quickly dispose of the government's argument. I have discussed the evidence of inducement at some length, however, because of its relevance to the question of predisposition. What Judge Rosenn expressed in *Watson* bears repetition: The greater the inducement, the heavier the government's burden of proving predisposition. 489 F.2d at 511.

B.

Criminal predisposition or intent, the "focus" of the entrapment defense, *Russell*, 411 U.S. at 429, is perforce, under the teachings of the Supreme Court, an inquiry into the defendant's subjective state of mind. "[T]he controlling question [is] whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Sorrells*, 287 U.S. at 451. The inquiry must begin with the presumption that the defendant is innocent; that is, that he was not predisposed to commit the crime. The government cannot overcome that presumption except by showing criminal predisposition beyond a reasonable doubt. There is no question, however, that the prosecution is allowed considerable latitude in introducing evidence to prove predisposition. "On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence." *Sherman*, 356 U.S. at 373 (quoting *Sorrells*, 287 U.S. at 451).

The majority avoid a detailed discussion of the evidence in the government's best case scenario of proof of predisposition, and for good reason: the government's case does not survive close analysis. The government relies heavily on certain recorded declarations of alleged co-conspirators Criden and Johanson, to the effect that Schwartz and Jannotti would be ready and willing to accept illegal payments in return for political favors. It anchors its argument on the familiar evidentiary rule that declarations made in furtherance of a conspiracy are admissible against co-conspirators as evidence of guilt. *See* Fed. R. Evid. 801(d)(2)(E). It cites evidence that Criden and Johanson indicated that Schwartz and Jannotti would be "interested in doing business," A453, and that

Criden, *at a time when he had not even met either defendant,* told Wald that each would "take a hot stove." A499. Jannotti, Criden said, had "been through this . . . a hundred times" and would "take a hot stove, like a vacuum cleaner." A895, 905.

The government argues that the jury could credit these declarations as evidence of the defendants' reputations, and therefore as probative of the ultimate factual question of predisposition. *Cf.* Fed. R. Evid. 803(21) (permitting hearsay evidence of reputation). The difficulty with this argument is that Criden and Johanson were not asked for and did not attest to the councilmen's reputations among their associates or in the community. Instead, the FBI agent, Wald, asked for and was given statements of personal opinion. Evidence of opinion is competent to prove character or a trait of character under the Federal Rules of Evidence, a major departure from the common law. Fed. R. Evid. 405(a); *see United States v. Curtis,* 644 F.2d 263, 267 (3d Cir. 1981); 2 J. Weinstein & M. Berger, Weinstein's Evidence at 405-1 to 405-10 (1980) (legislative history). Rule 405 permits only "testimony in the form of an opinion," however, and Criden and Johanson did not testify. Untested out-of-court declarations of opinion are not admissible to prove character, and if they were admissible they would be insufficient to support a finding of predisposition under the circumstances of this case.[23]

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23. Because the quoted declarations were evidence of opinion and not of reputation, I need not reach the question of whether a co-conspirator's statements of reputation would be admissible to prove character. I note, however, that Congress and the drafters of the Federal Rules of Evidence were careful to discriminate between reputation and opinion evidence. Rule 803(21) provides that evidence of reputation is not excluded by the hearsay rule, but there is no hearsay exception for evidence of opinion. Opinion evidence is permitted only by Rule 405, which is limited to testimony. Moreover, there are important functional distinctions between reputation and opinion. Hearsay evidence of a person's reputation can be re-

The government thus attempts to bolster its case by relying on conspirators' declarations to prove character, but it succeeds only in demonstrating the fundamental insufficiency of its evidence. Rule 405(a) permits proof of character by testimony as to reputation or by testimony in the form of an opinion; and because predisposition is an essential element of the entrapment defense, Rule 405(b) permits proof of specific instances of conduct. Therefore, the government might have offered evidence that the defendants had accepted illegal payments in exchange for official favors on previous occasions, *cf. United States v. Lemons*, 470 F.2d 135 (3d Cir. 1972) (per curiam), *cert. denied*, 412 U.S. 929 (1973) (evidence of prior dealings in illegal narcotics), or testimony that they were reputed among their associates or in the community to be disposed to accept bribes, *cf. United States v. Robinson*, 446 F.2d 562 (5th Cir.) (per curiam), *cert. denied*, 404 U.S. 959 (1971) (evidence of reputation for unlawful dealings). The prosecution shunned these methods of proof, however, and offers only untested declarations of opinion to support the verdict. Even if I considered this evidence admissible to prove predisposition, I would hold it insufficient as a matter of law to justify submitting the question to the jury. Without procedural

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NOTE — *(Continued)*

butted without cross-examining the declarant, merely by introducing reputation witnesses in rebuttal. A statement of opinion can be challenged or rebutted only by cross-examination.

The Fifth Circuit, sitting in banc, recently approached this problem in another way. In *United States v. Webster*, 649 F.2d 346 (5th Cir. 1981), the court overruled a long line of local precedent and held that hearsay evidence is never admissible to prove predisposition. The court had "little trouble rejecting the government's argument that such statements are admissible under the character/reputation provisions of the Federal Rules of Evidence, *see* Fed.R.Evid. 404(a)(1), 405, 803," 649 F.2d at 350 (footnotes omitted), and held that predisposition is not a character trait but a state of mind and thus that the "character/reputation provisions" do not apply.

safeguards designed to test its trustworthiness,[24] hearsay evidence of opinion is simply insufficient to support a guilty verdict in a criminal case.

Given the evidence of overwhelming inducement, the government's evidentiary burden to prove predisposition was commensurately substantial. I need not attempt to delineate the outer limits of that burden here, because, in my view, the prosecution's proof fell far short of the requirement. The government's best case scenario shows that the defendants arrived at the Barclay at the government's invitation, discussed city government and hotel investments, and accepted unsolicited offers of money. The circumstances demonstrate that they were offered substantial sums for their "friendship," that they considered the project in the city's best interests, and that they were made to believe that the sheik would not invest in Philadelphia unless he were permitted to "buy friends." In essence, the government's case is that the defendants consummated the crime by accepting money for friendship. Receiving money under these circumstances, whatever its relevancy to prove extortion, was insufficient as a matter of law to prove predisposition. The government has demonstrated convincingly that it has massive resources to encourage and inveigle local officials to commit crimes; that if sufficiently attractive monetary and civic inducements are dangled, there are fish who will bite. It does not demonstrate that the fish were predisposed to take the bait.

Viewing the government's case most generously, as we must, no finder of fact could reasonably infer beyond a reasonable doubt that the defendants were predisposed, given the circumstances of massive inducement established by the government's proof. Accordingly, I agree with Judge Fullam's determination that the gov-

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24. *See generally* Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957, 958-60 (1974).

ernment failed to present sufficient evidence of predisposition to submit the entrapment issue to the jury. I have made "due allowance for all reasonably possible inferences" favoring the government's case, but I must conclude that to accept the jury's verdict would be to allow "mere speculation . . . to do duty for probative facts." *Galloway v. United States*, 319 U.S. 372, 395 (1943).

IV.

The majority's clever approach to this very sensitive problem is a tribute to the skilled advocate's art. Set forth in Part III of their opinion, it is an unrelenting exhortation of major and minor premises that has an uncanny resemblance to mechanical justice. I do not fault its syllogistic structure; I quarrel only with the choice of major premises. I fault the majority's refusal to take as a beginning point the critical issue in any case where, as here, there is evidence of government inducement: Did the prosecution make out a *prima facie* case of *predisposition* on the part of the defendants beyond a reasonable doubt so as to merit submitting the entrapment question to the jury?

Instead, the majority have turned our American criminal justice system upon its head and reversed the burden of proof: Instead of requiring the government to prove that the issue was properly submitted to the jury, they demand proof from the defendants that it should not have been. Thus, the majority's approach, ringing and singing, is a classic example of the fallacy of *ignoranti elenchi*, or irrelevance.[25] Instead of proving point A, the defendants' predisposition, their argument proves unrelated point B, a rebuttal of factors which the district court considered in setting aside the verdict. In

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25. W. Sahakian & M. Sahakian, Ideas of the Great Philosophers 16 (1966).

the scholastic rhetorical sense, the majority's obligation was to present a *confirmatio* of the government's proof, not a *refutatio* of isolated contrary contentions.

Thus, the major discussion of this very important issue, set forth at great length in Part III of th : majority opinion, consists only of a refutation of what is described as the district judge's three stated reasons for his post-trial decision. Having rebutted these reasons, albeit skillfully, the majority rest their case. At most, however, what the majority have done, incident to refuting the benignity of the payments, is to prove a theory of extortion. They have not demonstrated how the government met its burden of proving defendants' predisposition to commit the offense. I can accept every iota of the majority's analysis in Part III and still conclude that their analysis passes wide of the relevant mark. The majority have proved that the amount of the money offered is no defense to extortion because city councilmen should have known better, III A; that there was no "benignity" of the payments, III B; and that Schwartz and Jannotti accepted the money, III D. Of the four items discussed by the majority in Part III, the only factual component relevant to the issue of pre-disposition was the "Arab mind" factor, Part III C.

The majority observe:

> After being carefully and specifically instructed on the significant factual issues in this case, the jury found the defendants guilty, thereby rejecting the entrapment defense. Its verdict represents a finding that, based on the totality of the evidence, including the observations by the jury of the actions, words, voice inflections and mannerisms of the defendants and the F.B.I. agents, the defendants were predisposed to engage in political corruption. The jury's verdict also represents a rejection of the notion that appellant Schwartz believed

> the $30,000 payment was a "consulting fee", as well as a rejection of the argument that the defendants were led to believe that the payment of money was simply to enable the representatives to report back to the sheik that they had made friends in accordance with the "Arab way" of doing business. Finally, it represents a rejection of defendants' argument, accepted by the district court, that the defendants were led to believe that unless they took the payments the hotel project would not come to Philadelphia.

Majority Opinion typescript at 54.

The majority thus conclude:

> The ultimate factual decisions in an entrapment case must be left to the jury. Where, as here, the jury was uniquely equipped to inquire into the calculus of human interaction, a court should not interfere with its conclusions. We conclude that in determining that defendants were entitled to a judgment of acquittal on the ground of entrapment as a matter of law the district court impermissibly substituted its own determination of the credibility of witnesses, the weight of the evidence and the inferences to be drawn from the evidence for that of the jury.

Id. at 55.

The last quoted sentence distills the basic division in this court which, at bottom, is a disagreement over the assignment of competences between judge and jury. To decide whether a jury question was presented, one must assume the credibility of the opposing witnesses; no contest was presented here as to credibility and, therefore, there was no need to go to the jury on that issue. As to the weight to be given to the evidence, that can relate to one of two factors: credibility, where it is placed in issue (and here it was not); or to the standard of proof be-

yond a reasonable doubt. In the latter situation, the judge — and not the jury — first makes this legal determination, and he must draw all reasonable inferences in favor of the prosecution. I suggest that this is the test that should have been applied — not to a solitary excerpt from Judge Fullam's explanation — but to all the evidence produced on the issue of whether the defendants were disposed to commit the acts absent the inducement of the government. The majority have accurately described the standard of review of a judgment n.o.v., Majority Opinion typescript at 39, but they then proceed to apply a newly formulated standard wherein they examine not the entire record, but only the evidence relevant to the district court's statement of why it set the verdict aside. *See id.* They thus substitute for a major jurisprudential hurdle less imposing hurdles that they can leap with facility.

Popular opinion may not care greatly about the fates of those entrapped and convicted by the government and its *agents provocateur*, but federal judges must care about the sword that is plunged into the body of trust between a people and their government. That body can withstand only so many wounds before its life will be no more. Thus, I have set forth an extended discussion of the jurisprudential, case law, and common sense.[26] reasons why I cannot tolerate what the majority do today. Speaking as if no large questions were involved, they will relegate to the jury the resolution of conflicting societal interests, a resolution that in the tradition of judicial courage belongs to the judge. Moreover, they justify it all in an argument built upon irrelevancy. The fundamental interests of justice in a free society deserve better. Therefore, I respectfully but vehemently dissent.

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26. "Common sense" as used here is not a makeweight. In this adjudication it is meant to be what judges perceive to be contemporary standards of received values.

V.

I turn now to the question of the district court's jurisdiction under the Hobbs Act. The jury found both defendants guilty under Count III of the indictment of conspiracy to obstruct interstate commerce in violation of the Hobbs Act, 18 U.S.C. §1951.[27] Indeed, this was the only basis of Jannotti's conviction. The district court set aside the verdict and dismissed Count III of the indictment, reasoning that the Act "does not operate to confer federal jurisdiction over purely hypothetical potential impacts on commerce which could never occur." 501 F.Supp. at 1185. I agree, and I therefore contend that, in addition to the entrapment defense, the judgment of acquittal on Count III should be affirmed for this separate reason.

I begin the Hobbs Act analysis with the familiar precept that federal courts are courts of limited jurisdiction.[28] Federal district courts are established by Acts of

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27. The Hobbs Act reads in pertinent part as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

18 U.S.C. §1951(a). The statute defines "commerce" as

> commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Id. §1951(b)(3).

28. The majority fault the defendants for not citing a "policy reason for us to accept their restrictive view of Congress' constitutional power to legislate as to conspiracies which pose a threat to interstate commerce." Majority opinion typescript at 30. There are, of course, several answers to this. First, it is the burden of the pros-

Congress and their jurisdiction is created solely by Congress. The majority have set forth the basic theme that the Hobbs Act definition of interstate commerce is coextensive with the constitutional definition. Majority Opinion typescript at 23-24. But some interference with or effect on interstate commerce, however minimal, is a jurisdictional element of a Hobbs Act offense, in the sense that a robbery, extortion, attempt, or conspiracy that has no contact with interstate commerce is beyond the subject matter competence of the district court. *United States v. Mazzei*, 521 F.2d 639, 642 (3d Cir.)(in banc), *cert. denied*, 423 U.S. 1014 (1975); *United States v. Staszcuk*, 517 F.2d 53, 59-60 (7th Cir.)(in banc) (Stevens, J.), *cert. denied*, 423 U.S. 837 (1975). *Cf. United States v. Feola*, 420 U.S. 671, 694-96 (1975) (presence of a federal officer necessary to establish federal jurisdiction over a conspiracy to violate 18 U.S.C. §111, which prohibits assaults on federal officers).

The majority rely on two decisions from the Seventh Circuit that appear to represent the frontiers of Hobbs Act jurisdiction in the federal courts today, *Staszcuk* and *United States v. Rindone*, 631 F.2d 491 (7th Cir. 1980) (per curiam).[29] Accepting the precepts there announced

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ecution to prove jurisdiction; not the burden of the defense to disprove it. Second, the issue is not a question of expansive or restrictive views of Congress' constitutional powers. Rather, giving Congress the maximum of constitutional power, can there be a vesting of federal jurisdiction without proof by the government of one iota of actual or potential effect on interstate commerce? Third, the "policy" sought by the majority is inherent in the Commerce Clause itself, which creates the legislative power; and that clause at its most broad interpretation, has never been construed to extend federal power over effects on commerce that are merely hypothetical, fanciful, or imaginary. In sum, giving Congress maximum constitutional power to interpret the interstate commerce clause does not mean giving Congress the power to abolish the clause.

29. Because *United States v. Rose*, 590 F.2d 232 (7th Cir. 1978), *cert. denied*, 442 U.S. 929 (1979), does not consider an issue of federal jurisdiction, it is irrelevant.

I conclude that the evidence presented by the government at trial failed to demonstrate the necessary "realistic probability that an extortionate transaction will have some effect on interstate commerce." *Staszcuk*, 517 F.2d at 60. In *Staszcuk* the defendant city councilman received $3,000 from a private individual and subsequently did not oppose a zoning change permitting construction of an animal hospital. After receiving bids from three contractors, however, the donor of this largesse changed his plans and used his land in a manner permitted by the unamended ordinance. The defendant contested federal jurisdiction, and the government presented the testimony of one of the contract estimators that construction of the animal hospital would have required the use of components manufactured outside the state. Determining that "a threatened effect on interstate commerce is sufficient to bring the statute into play notwithstanding the absence of any actual effect," *id.* at 59, the court focused its inquiry on the situation at the time of the offense, found a potential effect on commerce, and held that "jurisdiction . . . is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce." *Id.* at 60. Judges Sprecher, Swygert, and Pell dissented, finding potential effects insufficient to create federal jurisdiction.

In *Rindone*, a municipal inspector extorted payments from an electrical contractor by threatening to prosecute code violations and thus force the contractor out of business. Defendant Rindone argued that because the FBI supplied the money paid him by the contractor "no depletion of the payor's assets was possible and thus the nexus with interstate commerce [was] not sufficient to invoke Hobbs Act jurisdiction." 631 F.2d at 492. Following *Staszcuk*, the court focused on the situation at the time of the offense and held that when Rindone acted — at the time he demanded payment, before the

actual transfer of money and before the contractor spoke to the FBI — there was a realistic probability that the contractor's assets would be depleted by the extortionate transaction. *Id.* at 493-94.

Under these two cases, relied upon by the majority, the test is whether the government introduced sufficient evidence, or any evidence at all, demonstrating the *sine qua non* of federal Hobbs Act jurisdiction: "a realistic probability that [the Arab scheme] will have some [real and not fanciful] effect on interstate commerce." I have added the words "real and not fanciful" to the Seventh Circuit formulation in order to emphasize its conformity to the Hobbs Act jurisdictional requirements that our court has previously announced: "adequate evidence to establish that there was *some* effect on commerce," *United States v. Cerilli*, 603 F.2d 415, 424 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980). *See Mazzei*, 521 F.2d at 642. I find no such evidence on this record. The government relies on an apparent jury finding "that the extortionate scheme, *as perceived by defendants*, would have affected interstate commerce. . . . The hotel *was believed to be* a multi-million dollar investment, and substantial amounts of money and goods and services would have moved in interstate commerce as a result of its construction." Brief for Appellant at 28 n.10 (emphasis added). The argument obliquely concedes that the fantasies of federal agents cannot alone create federal jurisdiction, but then moves without logical support to a conclusion that belief by a listener can somehow convert a speaker's fancy into fact. I reject the government's theory that building castles in the air somehow confers federal jurisdiction on the ground.[30]

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30. The government synthesized its contention at the first oral argument before the panel:

> MR. FIORAVANTI: If the listener to the fairy tale accepts the facts as true and undertakes to become involved in a criminal conspiracy relying on those facts, then his agreement in-

Without a modicum, or at least a scintilla, to be very generous, of "*some* effect on commerce," the door to the federal courthouse simply cannot be opened. The Supreme Court made this crystal clear in *Feola*, when it emphasized that, regardless of the defendant's perception, the victim was indeed a federal officer and that was the operative fact investing federal jurisdiction. Thus, the court explained:

> The jurisdictional requirement is satisfied by the existence of facts tying the proscribed conduct to the area of federal concern delineated by the statute. Federal jurisdiction always exists where the substantive offense is committed in the manner therein described, that is, *when a federal officer is attacked*. Where, however, there is an unfulfilled agreement to assault, it must be established whether the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction. If the agreement calls for an attack on an individual specifically identified, either by name or by some unique characteristic, as the putative buyers in the present case, and *that specifically identified individual is in fact a federal officer*, the agreement may be fairly characterized as one calling for an assault upon a federal officer, even though the parties were unaware of the victim's actual identity and even though they would not have agreed to the assault had they known that identity. Where the object of the intended attack is

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NOTE — *(Continued)*

volved the violation of federal law even though the facts turn out to be a misperception. Because impossibility is no defense.

JUDGE ALDISERT: How does this believing have an effect on interstate commerce?

MR. FIORAVANTI: It does not, in fact, Your Honor.

Transcript of oral argument at 31-32.

> not identified with sufficient specificity so as to give rise to the conclusion that had the attack been carried out the victim would have been a federal officer, it is impossible to assert that the mere act of agreement to assault poses a sufficient threat to federal personnel and functions so as to give rise to federal jurisdiction.

420 U.S. at 695-96 (emphasis supplied).

The essential flaw in the majority's opinion is its failure to appreciate the jurisdictional nature of the commerce element in a Hobbs Act case. The majority interweaves its jurisdictional argument with the argument that factual impossibility of completing a substantive offense does not bar a conviction of conspiracy. They confuse *proof* of the crime of conspiracy with the jurisdictional *power* to punish the crime. The presence of subject matter jurisdiction is a discrete and primary issue in each case presented to a federal court, unlike a state court. The effect on commerce is both jurisdictional and substantive in a Hobbs Act prosecution, but the two inquiries are separate and distinct. *See, e.g., Feola*, 420 U.S. at 694-96. The majority have accepted the government's straw man argument that impossibility is no defense to crime of conspiracy. Even if I could in the exercise of judicial patience, tolerate a litigant's aggrandizement of irrelevancies, I must object to the majority's agreement to join the government in demolishing the straw man.

I can imagine "the persons of the dialogue," in the form of Socrates and Crito:

> Soc.: Is there federal jurisdiction?
>
> Cr.: Yes, there is federal jurisdiction.
>
> Soc.: How is there federal jurisdiction?
>
> Cr.: There is federal jurisdiction because factual impossibility of performing a conspiracy is no defense to a charge of conspiracy which may be brought when there is federal jurisdiction.

In terms of formal logic, how does one analyze this synthesis of the government's argument, which, nodding like Homer, the majority have accepted? To borrow from Lord Devlin, "I confess that I approach the investigation of this legal proposition with a prejudice in favour of the idea that there may be a flaw in the argument somewhere."[31]

Two such flaws quickly leap to the surface. Obviously, it is a *non sequitur*. More unfortunately, the reasoning "cooks the books," to use Professor Neil MacCormick's phrase,[32] or more popularly, it puts the bunny in the hat by begging the question in a classic *petitio principii:* Instead of *proving* the conclusion (presence of federal jurisdiction), the argument *assumes* it and then argues substantive law: factual impossibility as a defense to the conspiracy charge. The fundamental issue of this court's jurisdiction deserves a more serious, rational analysis.

I conclude with the district court that the evidence did not establish federal jurisdiction. The Hobbs Act contemplates conspiracies that have at least a realistic probability of affecting interstate commerce. A purely hypothetical effect, a fairy tale conjured by the FBI's answer to the Brothers Grimm, is not "a sufficient threat to [commerce] so as to give rise to federal jurisdiction." *Id.* at 695. *Cf. United States v. Archer*, 486 F.2d 670, 681-82 (2d Cir. 1973) (Friendly, J.) (Travel Act, 18 U.S.C. §1952, does not apply when federal officers supply the interstate element and act to ensure that an interstate element will be present for the purpose of transforming a local bribery offense into a federal crime).

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31. *St. John Shipping Corp. v. Joseph Rank*, [1957] 1 Q.B. 267, 282.

32. N. MacCormick, Legal Reasoning and Legal Theory 72 (1978).

VI.

Because of the view I take, I do not reach the due process and manufactured jurisdiction issues addressed by the majority.

VII.

To avoid unduly prolonging an opinion that is already too lengthy, I will not discuss in detail the majority's treatment of the "extortion under color of official right" argument, set forth in Part IIB of the majority opinion, other than to assert my continued disagreement with both the majority's conclusion and its supporting reasoning. I adhere to the views set forth in *United States v. Cerilli*, 603 F.2d 415, 426 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980) (Aldisert, J., dissenting), where I identified and analyzed the serious error this court committed in *United States v. Kenny*, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972), in its revolutionary interpretation of the Hobbs Act. I introduced my discussion as follows:

> It is now my view that our interpretation in *Kenny* and its progeny is not supported by the legislative intent underlying the Hobbs Act nor is it historically accurate. I believe that our failure to reexamine its rationale has resulted in a perpetuation of erroneous law not only in this circuit but in the First, Second, Fourth, Seventh, Eighth and Tenth Circuits which have followed our lead without setting forth a reasoned elaboration for their conclusions.

603 F.2d at 427 (footnotes omitted). Moreover, I demonstrated how Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo. L.J. 1171 (1977), effectively demolished the underlying theory that we accepted for our rule when we improperly accepted the analysis set forth in

Stern, *Prosecution of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 Seton Hall L. Rev. 1 (1971). I adhere today to every word I set forth in my *Cerilli* dissenting opinion and for this separate reason would affirm the judgments of acquittal on Count III.

VIII.

To be such a dissentient as I have been today amidst a college of respected peers, whose views I always respect, and much more often than not share, is not to present an animadversion of the majority's approach to this important case. Rather, I have attempted to demonstrate that this sensitive intersection between morality and positive law implicates sincerely held but diverse conceptions of justice.

> Whatever one's own beliefs, one lives among human beings in a community or various communities. One's fellows have, and one knows they have, moral attitudes towards and moral expectations of oneself, which reflect their moral principles and, perhaps, rules — their "moral code." It would take exceptional and not necessarily commendable tough-mindedness to ignore or show indifference to these attitudes and expectations.[33]

In admitting to a Humean philosophy, I believe that our moral, like our legal, life has a necessary social and experiential setting. It is this which stocks our vast inventory of standards of societal conduct — legal rules or principles — "in the context of which we can frame and test new principles of action in new or difficult circumstances."[34]

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33. N. MacCormick, Legal Reasoning and Legal Theory 274 (1978).

34. *Id.* at 124.

The choice or construction of normative principles from this inventory is what divides our court today. As a full court we have faced the responsibility of choosing between rival models for, rival patterns of, law enforcement in our society. We have attempted to do justice according to law, not justice in the raw. We diverge only on what is meant by "according to law." Because I agree with the result reached by Judge Fullam, I would affirm the judgment of acquittal.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 80-166

UNITED STATES OF AMERICA

v.

HOWARD L. CRIDEN, et al.

MEMORANDUM AND ORDER

FULLAM, *J.* AUGUST 18, 1980

The Indictment in this case may be summarized as follows:

Count One charges the defendant Criden with conducting the affairs of an enterprise (his law firm) through a pattern of extortionate activity in violation of 18 U.S.C. § 1962(c) (the "RICO" statute).

Count Two charges all four of the defendants with conspiracy to violate the RICO statute, under 18 U.S.C. § 1962(d).

Count Three charges all four of the defendants with Hobbs Act conspiracy; 18 U.S.C. § 1951(b).

The remaining counts charge substantive violations of the Hobbs Act, under 18 U.S.C. § 1951 and 18 U.S.C. § 2. Count Four charges the defendants Criden and Johanson, Count Five Criden and Schwartz, and Count Six charges the defendants Criden and Jannotti.

All of the defendants seek dismissal of the Indictment on the ground that massive and prejudicial publicity

tainted the grand jury proceedings, and on the ground that prosecution is impermissible because of alleged prosecutorial misconduct.

All of the defendants also seek dismissal of the Hobbs Act counts on jurisdictional and substantive grounds; and the defendant Jannotti also seeks dismissal of Count Two, as to him, on substantive grounds.

All of these contentions will be discussed *seriatim*.

Factual Background

In the latter part of 1978, F.B.I. agents in the Eastern District of New York undertook a "sting" operation which has come to be known as "Abscam." Undercover F.B.I. agents and paid informants with extensive experience in various criminal enterprises set themselves up as purported representatives of wealthy Arab investors seeking worthwhile investments in this country. The operation was conducted under the general supervision of the Organized Crime Strike Force in the Eastern District of New York, headed by Thomas Puccio, Esq. The undercover operatives purported to engage in business under the name Abdul Enterprises, Inc., supposedly owned by the Arab investors.

Initially, the purpose of the undercover operation was to locate stolen art objects and fraudulent certificates of deposit and other securities, with a view toward prosecuting the persons involved in such crimes. After achieving some limited success in those areas, and perhaps as a result of leads developed during the early stages of the operation, the investigators turned their efforts toward official corruption of various kinds: possible corruption in connection with zoning and licensing matters in Florida; possible corruption and organized crime infiltration in connection with casino licensing in Atlantic City, New Jersey;

possible corruption on the part of congressmen and immigration officials in connection with immigration matters; and, by late 1979, possible corruption on the part of public officials of the City of Philadelphia in connection with zoning matters and port-development matters. The processes by which this transition occurred, and the manner in which the entire operation was conducted, are challenged by the defendants in their pending dismissal motions.

The defendants Criden and Johanson are lawyers, and were partners in a Philadelphia law firm. They represented a client who held an option on a valuable piece of property in Atlantic City, and who was interested in constructing a casino on that site. The attorneys were seeking financing for the project. Through Mayor Angelo Errichetti of Camden, New Jersey, they were introduced to the undercover agents, and were led to believe that the (fictitious) Arab investors might well be willing to provide the necessary financing.

In the course of a meeting in Florida to discuss the casino project, in circumstances not yet fully developed on the record, Criden and Errichetti were given to understand that the Arab investors would be willing to pay substantial sums of money to members of Congress for assistance in resolving any problems with the Immigration and Naturalization Service which might arise, should the Arab investors desire to gain permanent residency in this country. According to the Government, Criden thereafter became involved in arranging meetings between the undercover agents and various members of Congress to whom bribes were paid; Criden allegedly received substantial fees for arranging such meetings. Four members of Congress, and both Criden and Errichetti, have been indicted in the Eastern District of New York on charges stemming from these alleged activities. As this

Memorandum is being written, trial on one of these indictments is now under way in that district.

In early January 1980, the remainder of the Abscam operation was transferred from New York to Philadelphia, where local aspects of the investigation came under the supervision of the Philadelphia F.B.I. office and the United States Attorney for this district, Peter Vaira, Esq. (Throughout most of the Abscam investigation, United States prosecutors in various districts, most notably Philadelphia and New York, had been coordinating their efforts; it turned out that most of the alleged corruption being investigated was centered in Philadelphia and New Jersey.)

In Philadelphia, the "scenario" presented by the undercover agents was that the Arab investors had decided to construct a multi-million-dollar hotel project in Philadelphia, and would also be interested in major port improvements in the City, in connection with a major effort to revitalize the coal industry in Pennsylvania. Criden was asked to arrange meetings with City officials whose "friendship" could be purchased by the Arabs in order to resolve any zoning problems or other problems with local government which might arise in connection with the hotel project. The Indictment charges that Criden arranged meetings between the undercover agents and the other three defendants, all of whom are members of the Philadelphia City Council, and all of whom are alleged to have accepted bribes from the undercover agents in exchange for pledges of assistance. These alleged activities, meetings, and payments form the basis for the charges set forth in the Indictment in this case.

The Evidentiary Record

All of the meetings and conversations between the undercover agents and the defendants which directly pertain to the Philadelphia aspect of the Abscam investigation

were electronically recorded or video-taped. The transcripts have been made a part of the record for purposes of the present ruling, and the Court has also viewed the pertinent video tapes and listened to various electronic recordings. The Court has reviewed the entire transcript of the grand jury proceedings, and has required disclosure of relevant portions of these transcripts to the defense. The Court has also reviewed *in camera* certain other materials: the Blumenthal Report, stemming from the investigation conducted by the Department of Justice into the premature disclosures of the investigation to the press; a pre-prosecution memorandum prepared by Mr. Puccio; and a memorandum submitted to the Attorney General of the United States by the United States Attorney's office in New Jersey (the "Del Tufo Memorandum"). None of these latter memoranda has been disclosed to the defendants. Counsel for the Government has copies of the Puccio and Del Tufo memoranda, but has not seen the Blumenthal Report. The Court has also listened, in camera, to certain untranscribed recordings of conversations between an F.B.I. informant and a certain Florida official, for purposes of determining whether these recordings should be disclosed to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963). The Court has also reviewed a transcript of the testimony of a now deceased witness before the New York grand jury, for the same purpose.[1]

The Court has also conducted several days of hearings, at which extensive oral testimony was presented.

Prejudicial Publicity

Disposition of this aspect of the defense motion has been anticipated in this Court's Memorandum of July 25,

1. Only those materials made available to counsel have been considered in reaching the decisions announced in this Memorandum.

1980. As noted in that Memorandum, the Government's admitted responsibility for the premature and excessive press coverage of the Abscam investigation and its consequences, while unfortunate and not to be condoned, simply does not amount to a violation of due process of law. I have carefully examined the transcript of the grand jury proceedings, and have found nothing to suggest that the media barrage had any impact upon those proceedings. Indeed, every effort was made to ensure that the grand jurors had not been and would not be influenced by the extensive press coverage; and these efforts appear to have been successful. In short, no prejudice to the defendants has yet been shown. Indeed, an argument can be made that the media barrage has been at least as harmful to the Government's efforts as to the interests of the defendants.

If an untainted trial jury can be convened, the defendants will have no ground for complaint. That issue must be determined at trial. And, if a fair trial cannot be assured in this district, there are several alternatives short of dismissal which might be pursued without doing violence to the due process rights of the defendants.

Prosecutorial Misconduct

The defendants seek dismissal of the Indictment on the ground of prosecutorial overreaching amounting to a violation of due process of law. They contend not only that the defendants' due process rights would be violated by permitting the case to proceed to trial, but also that, in the exercise of its supervisory authority over the administration of criminal justice, the Court should decline to sanction the methods employed by the investigators in this case.

The defendants assert that persons for whose conduct the prosecution is accountable intentionally caused the

premature and excessive media coverage of the Abscam investigation, in order to stampede the grand jury into returning the Indictment, and in order to preclude responsible officials in the Justice Department from declining to prosecute. However, the principal thrust of the defense argument is that the methods employed by the prosecutors and their investigators were shocking and outrageous, and should not be tolerated. This latter argument raises issues which are akin to, but different from, the defense of entrapment.

If, as seems inevitable in this case, the evidence at trial sufficiently shows that the defendants were induced by F.B.I. agents to commit the crimes charged, the burden will be upon the Government to prove beyond a reasonable doubt that the defendants were predisposed to commit the offenses. *Sherman v. U.S.*, 356 U.S. 369 (1958); *Sorrells v. U.S.*, 287 U.S. 435 (1932); *U.S. v. Russell*, 411 U.S. 423 (1973); *Hampton v. U.S.*, 425 U.S. 484 (1976); *U.S. v. Watson*, 489 F.2d 504 (3d Cir. 1973); *U.S. v. Shoup*, 608 F.2d 950 (3d Cir. 1979); *U.S. v. Levin*, 606 F.2d 47 (3d Cir. 1979). The cited decisions stand for the proposition that ordinarily, at least in contraband cases, and perhaps in all cases involving so-called "victimless" crimes, the defense of entrapment is not available to a defendant who can be shown to have been predisposed. Whatever may be the ramifications of the entrapment defense in the factual context of this case, it is clear that entrapment issues are to be resolved at trial, and the defendants do not argue otherwise.

However, a majority of the Supreme Court in *Hampton v. U.S., supra,* have expressed the view that a due process defense, based on outrageous law enforcement conduct, is available, and is not defeated by evidence of the defendant's predisposition. The Third Circuit Court of Appeals has so held, *U.S. v. Twigg*, 588 F.2d 373 (3d

Cir. 1978), and Judge Friendly has expressed a similar view for the Second Circuit Court of Appeals. *U.S. v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973).

In *Twigg*, the creative involvement of government agents in the criminal activity charged to the defendant was so extensive and pervasive as to lead the court to conclude that, in reality, the crime was committed by the Government with only marginal and incidental involvement on the part of the defendant. In *Archer*, the court expressed disapproval of an undercover operation in which government agents committed a series of independent crimes in order to lend credibility to their undercover pretenses.

In the present case, in addition to the publicity issue mentioned above, the defendants argue that independent crimes by the paid informants were sanctioned or condoned. However, their principal challenge is that the undercover agents went to outrageous and excessive lengths in inducing the defendants to become involved.

The alleged independent criminal activity on the part of the undercover informants appears to have been remote, both temporally and geographically, from the investigative activities leading up to the present Indictment. It certainly was not authorized, and probably was not condoned, by any government agent. The due process rights of these defendants were not affected thereby. This factor is entitled to little, if any, weight in the exercise of whatever discretionary power the Court may have over the administration of criminal justice, as it relates to this case.

It is not at all clear that excessive inducement, as an issue of due process, can successfully be disentangled from the entrapment defense. In any event, it cannot be ruled upon at this time, for at least two reasons:

1. While the present record includes the electronic recordings of all meetings between the undercover agents

and the defendants, the record does not disclose the communications which preceded these meetings. Apparently, Criden was the emissary, but the record does not disclose what representations he may have made to the other defendants. Moreover, each defendant's perception of the situation assumes critical importance. In my view, it is simply impossible to resolve the due process issues raised here without the defendants' testimony. I do not mean to suggest, necessarily, that the defendants must testify at trial in order to avail themselves of an entrapment defense. I mean simply that, in order to obtain pretrial dismissal of the Indictment on due process grounds, the actual impact of the alleged overreaching upon each defendant must be shown, and cannot be merely surmised.

2. Even on the present record, it cannot be said that the facts are undisputed. *U.S. v. Graves*, 556 F.2d 1319 (5th Cir. 1977) stands for the proposition that the defense of alleged governmental misconduct can properly be resolved on a pretrial motion (556 F.2d at p. 1322); *see also U.S. v. Quinn*, 543 F.2d 640, 647-48 (8th Cir. 1976). However, the First Circuit Court of Appeals has expressly left open the question whether factual disputes concerning the alleged misconduct are to be resolved by the trial judge or by the jury. *U.S. v. Johnson*, 565 F.2d 179, 181-82 (1st Cir. 1977). And in this circuit, the opinion in *Twigg, supra*, includes this *caveat:*

> "When the facts concerning the nature of the police conduct are disputed, it is unclear whether a jury resolution of the issues is required prior to a ruling by the court. *See U.S. v. Johnson, supra*, 565 F.2d at 181. As the facts in the instant case are uncontested, we need not decide this question." (588 F.2d at p. 379, n.8.)

In view of these uncertainties, the preferable course is to defer resolution of the due process issue until trial. Concurrent, independent resolution of the disputed facts by the judge and the jury would presumably provide a basis for resolution of the procedural problem.

The Defendant Jannotti's Motion to Dismiss Count Two

I am satisfied that Count Two of the Indictment is not facially defective insofar as it pertains to the defendant Jannotti. His Motion to Dismiss that count, in the final analysis, merely asserts that the Government will be unable to sustain its burden of proof. That issue must await trial.

The Hobbs Act Counts

The Hobbs Act, 18 U.S.C. § 1951(a), provides for the conviction of

> "whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do. . . ."

In subsection (b)(2), the term "extortion" is defined to include

> "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

The fourth, fifth and sixth counts of the Indictment in this case charge the various defendants with substantive violations of the Hobbs Act. In each count, it is charged that specified defendants

> "did knowingly and willfully attempt to obstruct, delay and affect commerce . . . by extortion . . . by obtaining and causing to be obtained money . . . which was not lawfully due the defendants, from Michael Wald and Ernest Haridopolis, with their consent, which consent was induced under color of official right."

In the third count, all four defendants are charged with conspiring to violate the Hobbs Act, in that they

> "did knowingly, willfully, and unlawfully conspire and agree with one another, and with other persons . . . to commit extortion as that term is defined in Title 18, United States Code, Section 1951(b)(2), which extortion would affect commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), and the movement of supplies and other materials, equipment, services and labor in commerce"

in that

> "it was part of the conspiracy that [the defendants] would obtain and cause to be obtained money . . . which was not lawfully due the defendants, from Michael Wald and Ernest Haridopolis, with their consent being induced under color of official right."

Counts Three through Six are facially valid, and adequately charge the defendants under the Hobbs Act. However, the unusual facts of this case—established beyond dispute in the course of pretrial hearings, and, indeed, conceded by the Government—present very serious questions as to whether the charges embraced in Counts Three through Six are within the jurisdiction of any federal court. Specifically, the question is whether there exists the re-

quired nexus with interstate commerce.[2] The victims of the alleged extortion in this case, Messrs. Wald and Haridopolis, were F.B.I. agents acting in an undercover capacity. They purported to be representing wealthy Arab investors interested in constructing a multi-million-dollar hotel project. The defendants were allegedly bribed to obtain their pledges of assistance in resolving any zoning problems which might arise and to ensure that the proposed project would not encounter any difficulties with local governmental authorities. The Arab investors, and the proposed hotel project, were entirely imaginary.[3] All of the "cover" arrangements which lent credibility to the agents' pretenses were made by F.B.I. agents, and were paid for with Department funds. The Justice Department

2. A further possible problem, whether extortion "under color of official right," for Hobbs Act purposes, encompasses mere bribery, or whether some degree of coercion must be shown, appears to have been settled, in this circuit, in favor of the broader definition. *U.S. v. Kenny*, 462 F.2d 1205 (3d Cir. 1972); *U.S. v. Mazzei*, 521 F.2d 639 (3d Cir.) (*en banc*), *cert. denied*, 433 U.S. 1014 (1975); *U.S. v. Cerilli*, 603 F.2d 415 (3d Cir. 1979). But *see U.S. v. Addonizio*, 451 F.2d 49, 72 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); and Judge Gibbons' dissenting opinion in *Mazzei* and Judge Aldisert's dissenting opinion in *Cerilli*. Needless to say, this Court is bound by the prevailing view of this circuit. Moreover, I suspect that in most instances in which a public official wrongfully obtains money under color of official right, some degree of coercion is present.

3. In earlier, related aspects of this "sting" operation (commonly referred to as "Abscam"), undercover agents professed to be representing a business entity, Abdul Enterprises, Inc., supposedly owned by the wealthy Arab investors. While this fictitious corporation appears not to have been mentioned in their dealings with these defendants, it may be that the undercover agents here involved should be regarded as professing to act on account of Abdul Enterprises, Inc. Be that as it may, the fact is that no corporation by that name ever existed.

itself was also the source of the funds allegedly used to bribe the defendants.

The reach of federal jurisdiction under the Hobbs Act is indeed extensive. The Supreme Court has concluded that the Act reflects a Congressional intent "to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. U.S.*, 361 U.S. 212, 215 (1960). It follows that federal prosecution is permissible whenever there is any actual impact, however minimal, upon interstate commerce, *U.S. v. Cerilli, supra, U.S. v. Spagnolo*, 546 F.2d 1117, 1119 (4th Cir. 1976) *(per curiam), cert. denied*, 433 U.S. 909 (1977); or whenever, notwithstanding the absence of any actual impact on interstate commerce, potential impact can be shown. *U.S. v. Staszcuk*, 517 F.2d 53 (7th Cir.) *(en banc), cert. denied*, 423 U.S. 837 (1975). And it is not necessary to show that defendants intended to affect interstate commerce:

> "It is not necessary that the *purpose* of the extortion be to affect interstate commerce . . . but only that one of the *natural effects* thereof be an obstruction of that commerce." *U.S. v. Addonizio*, 451 F.2d 49, 77 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972).

Although a principal purpose of Congress in enacting the Hobbs Act was to protect interstate commerce from racketeering activities, it is not necessary to establish that the defendant's activities constituted racketeering, if they fall within the proscriptive language of the statute. *U.S. v. Culbert*, 435 U.S. 371 (1978).

In the present case, however, it is clear that there was neither actual nor potential nor threatened impact upon interstate commerce. Only two possible bases for the exercise of federal jurisdiction remain to be considered:

(1) it might be held that the transaction should be viewed from the perspective of the defendants; since they thought the bribes were being paid to smooth the way for completion of a hotel project which, had it existed, would have been engaged in interstate commerce, federal jurisdiction attaches. Or (2) it might be held that municipal bribery is likely to have some impact on interstate commerce, and that the statute reaches all conduct within that class, irrespective of actual or potential impact on interstate commerce in a particular instance. The opinion written by Judge Stevens (now Mr. Justice Stevens) for the *en banc* Seventh Circuit Court of Appeals in *U.S. v. Staszcuk, supra,* is instructive on both points:

In *Staszcuk,* a Chicago alderman was indicted for Hobbs Act extortion, for receiving money under color of official right in connection with certain proposed zoning changes. In the pertinent count, he was accused of receiving a bribe to effect a zoning change which would have permitted construction of a veterinary hospital. After the zoning change was accomplished, the veterinarian changed his mind, and the property was used for a purpose which would have been permissible under the original zoning. The sole proof of an interstate commerce nexus was testimony to the effect that, if the veterinary hospital had been constructed, it probably would have required the purchase of materials from out of state. A panel of the Seventh Circuit reversed the conviction, because of the absence of any impact on interstate commerce. The court *en banc* reinstated the conviction, however, on the theory that, at the time the bribe was received, there existed a reasonable probability of an impact on interstate commerce. The court stated:

> "There was no need to prove that the extortion was actually intended to obstruct or affect interstate commerce. The commerce element of the Hobbs Act violation is jurisdictional . . .

"We are also persuaded that the cases which uniformly hold that a threatened effect on interstate commerce is sufficient to bring the statute into play notwithstanding the absence of any actual effect, correctly interpret the Congressional purpose . . .

"This does not mean, however, that we may ignore the constitutional limits on the power of the national government. Nor may we disregard the statutory language which requires the prosecutor to prove some connection with interstate commerce in every case. We hold, however, that the commerce element of a Hobbs Act violation—the federal jurisdictional fact—may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce. Congressional concern is justified by the harmful consequences of the class of transactions to which the individual extortion belongs, and jurisdiction in the particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce.

"The jurisdictional inquiry must, of course, focus on the situation at the time of the offense. In this case the crime occurred on December 8, 1970. No actual effect on commerce occurred either before or after that date. It was, nevertheless, entirely reasonable for the jury, assessing probabilities as of that time, to find that a potential effect on commerce had been proved. The jury could reasonably infer that, as a result of the extortion on that date, there was then a likelihood that the movement across state lines of a furnace, plate glass, and plumbing and electrical fixtures would be affected . . . Contrary to the prosecutor's view, however, we do not think appellant's

guilt or innocence may be determined entirely on the basis of the intent of the property owner or the zoning man; nor on the other hand, do we think federal jurisdiction is defeated by the fortuitous circumstance that, after the crime had been committed, a change of plans occurred and the hospital was never built." 517 F.2d at pp. 59-60.

Judge Stevens appended this significant footnote:

"The language of this statute does not permit us to treat it as a determination that since the class of activities giving rise to federal concern has an adverse effect on commerce, Congress intended any activity within the class to be subject to prosecution without the necessity of any showing of an actual or potential effect on commerce in the particular case." *Id.*, n. 16, p. 59.

It should be noted that certain other statutes do permit the conclusion that Congress intended to deal with a class of offenses, without regard to the impact of individual offenses upon interstate commerce. *See U.S. v. Hunter*, 478 F.2d 1019 (7th Cir. 1973) (gambling in violation of the Organized Crime Control Act of 1970); *Perez v. U.S.*, 402 U.S. 146 (1971) (loansharking, in violation of Title II of the Consumer Credit Protection Act). However, as noted by Judge Stevens, the Hobbs Act is not such a statute. *See also U.S. v. Elders*, 569 F.2d 1020 (7th Cir. 1978).

"Courts have consistently held that the Act should be given an expansive interpretation to cover a wide range of extorti[o]nate activity. In each case, however, a nexus has been required between the extortionate conduct and interstate commerce in order to establish federal jurisdiction. That nexus

> may be *de minimis* [citations omitted], but it must nonetheless exist. Additionally, the connection with or effect on interstate commerce must have been at least a 'realistic probability' at the time of the extortionate act [citing *Staszcuk*]." 560 F.2d at pp. 1023-24.

The Government relies principally upon *U.S. v. Santoni*, 585 F.2d 667 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979), *U.S. v. Gambino*, 566 F.2d 414 (2d Cir. 1977), *cert. denied*, 435 U.S. 952 (1978) and *U.S. v. Brooklier*, 459 F. Supp. 476 (C.D. Cal. 1978). In *Gambino*, F.B.I. agents set up and arranged for the operation of a garbage-collection business in order to ferret out criminal activity on the part of organized crime figures; in *Santoni*, the F.B.I. set up a corporation which entered into contracts for chemical cleaning and building demolition, in order to uncover corruption on the part of employees of the City of Baltimore, Maryland, in connection with municipal contracts. Both of these cases are readily distinguishable from the present situation. In both instances, actual business entities existed and operated, and were themselves extensively engaged in interstate commerce. In *Gambino*, it was clearly established that the defendant's loansharking, extortions, and assaults had an actual and direct effect upon the garbage-collection industry in general and upon other private firms in particular. In *Santoni*, not only was the F.B.I. 'cover' firm itself engaged in interstate commerce, but the defendant's extortionate activities were shown to have direct impact upon genuine contracts with the city, which contracts required substantial out-of-state purchases. Indeed, the Fourth Circuit in *Santoni* stressed the fact that performance of the municipal contracts would have mandated interstate purchases, irrespective of the identity of the successful bidder. Moreover, it seems obvi-

ous that, in both of the cited cases, the defendants' activities affected competitors of the victim company, as well as the victim itself.

The only case cited by the Government in which the purported interstate commerce features seem to have been entirely fictional is *U.S. v. Brooklier, supra.* In that case, a firm named Forex Company was ostensibly engaged in the "sale of pornographic films to Mexico and South America." The defendants demanded a "piece of the action" and, through the use of actual and threatened force, extorted $6500 from the company. The firm was actually an undercover business established by the F.B.I., and the Government conceded that no actual effect on interstate commerce was caused by defendants' activities. The court held: (1) that the indictment properly charged an attempt to obstruct delay and affect commerce by the wrongful use of actual and threatened force; (2) that the defendants could properly be convicted of attempting to violate the Hobbs Act, notwithstanding the impossibility of actually achieving a violation; and (3) Congress intended the Hobbs Act to apply to all extortionate activity, regardless of its effect on interstate commerce. The court's opinion makes clear that the first two conclusions are squarely contrary to the views of the Third Circuit Court of Appeals in *U.S. v. Berrigan,* 482 F.2d 171 (3d Cir. 1973); the third conclusion appears to conflict with *U.S. v. Staszcuk supra.*

In *Berrigan,* the defendant was charged with attempting to smuggle letters out of a federal prison. An essential element of the completed crime in that case was lack of knowledge on the part of the warden. Actually, unbeknownst to the defendant, the warden was aware of the smuggling. The defendant was convicted of attempting to commit the crime, but the Third Circuit reversed the conviction. The court reasoned that, even though the de-

fendant had the subjective intent to violate the law, subjective intent is not the standard: If the completed act contemplated by the defendant would not be criminal, the defendant cannot be convicted of attempt.

The *Berrigan* court meticulously analyzed the concept of intent. As I understand it, this analysis, if applied to the facts of the present case, leads to this analysis: The defendants intended to receive bribes from the two individuals named in the Indictment. If there was a realistic probability that receiving bribes from those individuals would have an impact on interstate commerce, conviction would be proper; if not, there can be no conviction, at least under the substantive counts, even though the defendants may mistakenly have believed that their actions could have affected interstate commerce.

I have concluded that the defendants cannot be convicted of attempting to obstruct commerce through extortion, as charged in the fourth, fifth and sixth counts of this Indictment. The *Berrigan* case requires that result as a matter of substantive law, and the *Staszcuk* case requires that result on jurisdictional grounds as well.

The remaining question is whether the conspiracy charge in the third count can be sustained. The general view is that impossibility is not a defense to a conspiracy charge:

> "The crime of conspiracy is complete upon the agreement to violate the law, as implemented by one or more overt acts . . . and is not at all dependent upon the ultimate success or failure of the planned scheme."

U.S. v. Thompson, 493 F.2d 305, 310 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974); *see also U.S. v. Sanford*, 547 F.2d 1085 (9th Cir. 1976). *Berrigan* was not a conspiracy case, and therefore does not preclude reliance

upon the subjective state of mind of the defendant in the conspiracy context. And the *Staszcuk* court's discussion of Hobbs Act jurisdiction does not refer to the conspiracy problem.

If it can be established that conspirators actually intended to obstruct interstate commerce, I have no doubt that a federal prosecution for conspiracy under the Hobbs Act would be permissible. And, while the question is a close one, I am inclined to believe that, when two or more persons conspire to do an act which appears likely to have an adverse impact upon interstate commerce, they are subject to federal prosecution for conspiracy even though, unknown to them, no such impact on interstate commerce could eventuate.

The record thus far established does not rule out the existence of either type of intent on the part of the defendants. The third count, the conspiracy count, is therefore not properly subject to pretrial dismissal. The Government is entitled to an opportunity to attempt to prove at trial all of the essential elements of the charge, including the jurisdictional predicate.[4]

I recognize that there is a further problem in this case, in that the intent of the alleged conspirators can only have been based upon the representations of the government agents. The contention that this constitutes artificial creation of federal jurisdiction is not lacking in substance. *See U.S. v. Archer, supra.* But *U.S. v. Santoni, supra,* and *U.S. v. Gambino, supra,* seem to cast some doubt on the continued validity of the artificial-jurisdiction views expressed in *Archer.* This doubt, in my view, militates against pretrial dismissal.

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4. As noted above, the facts which, in my view require dismissal of the substantive counts, are conceded by the Government. Indeed, they appear on the face of the Indictment, when read in its entirety.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 80-166

UNITED STATES OF AMERICA

v.

HOWARD L. CRIDEN, et al.

ORDER

AND Now, this 18th day of August, 1980, it is ORDERED:

1. Defendants' Motion to Dismiss Counts Four, Five, and Six of the Indictment is GRANTED, and those counts are dismissed as to all defendants.

2. In all other respects, the defendants' Motions are DENIED, without prejudice.

3. Defendant Jannotti's Motion to Dismiss Count Two of the Indictment is DENIED.

JOHN P. FULLAM, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 80-166

UNITED STATES OF AMERICA

v.

HARRY P. JANNOTTI
GEORGE X. SCHWARTZ

MEMORANDUM AND ORDER

FULLAM, *J.* November 26, 1980

The defendant George X. Schwartz has been found guilty by a jury of conspiring, in violation of 18 U.S.C. § 1962(d), to violate provisions of the Racketeer Influenced and Corrupt Organizations Statute, 18 U.S.C. § 1962(c) ("RICO" conspiracy), and, together with co-defendant Harry P. Jannotti, of conspiring to obstruct commerce in violation of the Hobbs Act, 18 U.S.C. § 1951(a). Before trial, both defendants sought dismissal of the Indictment on constitutional grounds, alleging various forms of prosecutorial misconduct. Extensive hearings were held, but I concluded that decision must await the further development of the record at trial. At the conclusion of the Government's case, and again at the conclusion of all of the evidence, the defendants sought judgment of acquittal pursuant to F.R.Crim P. 29, and renewed their motions to that end after the jury's verdict. This Opinion addresses both sets of motions, which to some extent involve similar or closely related issues.

I. Hobbs Act Conspiracy

At all pertinent times, the defendant Schwartz was President of the Philadelphia City Council, and the defendant Jannotti was a member of City Council. The Government's evidence at trial proved that Schwartz accepted $30,000 and Jannotti accepted $10,000 from undercover F.B.I. agents who purported to be representatives of wealthy Arab investors contemplating construction of an elaborate hotel complex in Philadelphia. There is no dispute about the defendants' receipt of the payments, and the evidence permitted, although it did not compel, the inference that the payments represented bribes paid in exchange for the defendants' assurances of using their official positions to pave the way for expeditious completion of the project.

The Hobbs Act, 18 U.S.C. § 1951(a) makes criminal the conduct of

> "whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do. . . ."

The issue to be decided is whether the Government succeeded in proving the necessary nexus betwen the defendants' actions and interstate commerce. The Government introduced no evidence on that subject, arguing instead that the jury should be permitted to infer, on the basis of common knowledge, that a hotel project of the magnitude of the one under discussion (ultimately stated to be approximately $34 million) would necessarily involve interstate commerce; and that, in any event, the transfer of funds for the project by the foreign investors would fall within the definition of commerce as used in the Hobbs Act.

For present purposes, I shall assume that the evidence permitted the jury to conclude that, if the project had in fact been a genuine project, it would have required the movement of articles in interstate commerce, and that the payment of these bribes would have affected such commerce by depleting the funds available for carrying out the project. The problem which remains is that there never was any such planned project. The Arabs, their plans, and their money, were all entirely fictitious.

At an earlier stage of this litigation, by Order entered August 18, 1980, I dismissed those counts of the Indictment which charged substantive offenses under the Hobbs Act, reasoning that there was no possibility that the bribe payments could actually have affected commerce. I declined at that time to dismiss the conspiracy charge, however, on the theory that the Government might be able to prove that the defendants had an actual conscious intent to obstruct interstate commerce, and that legal impossibility of fulfillment of such intent would not be a defense to a conspiracy charge. I also left open the possibility that proof of a conspiracy to commit acts which, if completed, would affect commerce, might suffice to establish federal jurisdiction.

There is no contention that the evidence at trial proved that interference with interstate commerce was a conscious object of the alleged conspiracy. And, upon further reflection, I am now of the opinion that this Court's jurisdiction under the Hobbs Act has not been established.

The Government's position, adopted in the Court's charge to the jury, is that the matter should be viewed from the perspective of the defendants. If, as the defendants perceived the matter, the actions they conspired to carry out could realistically have had an effect on interstate commerce, the Government contends, they can prop-

erly be convicted of Hobbs Act conspiracy. I am constrained to disagree. Federal jurisdiction is not conferred by a defendant's erroneous perceptions. The criminal jurisdiction of a federal court is conferred by the laws enacted by Congress. While the jurisdictional reach of the Hobbs Act is undoubtedly extensive, touching conduct having only minimal or potential impact upon commerce (broadly defined), it does not operate to confer federal jurisdiction over purely hypothetical potential impacts on commerce which could never occur.

Another aspect of this problem should perhaps be mentioned. Extortion, as used in the statute, is defined as

> ". . . the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." (§ 1951(b)(2).)

As discussed in my August 18, 1980 Memorandum, there is some lack of unanimity among appellate decisions as to whether "consent induced . . . under color of official right" covers ordinary bribery, or whether some element of coercion is required to be shown. While it is now clear in this Circuit that the use of official position to obtain money unlawfully is covered by the Hobbs Act, all of the decisions on that subject in this Circuit involved situations in which a demand or request for payment could reasonably be perceived as having emanated from the public official. I am aware of no appellate decision, in any circuit, upholding a Hobbs Act conviction on the basis of a bribe which was neither requested by the official, nor perceived by the payor as either necessary or at least helpful. In contrast, the evidence in the present case clearly establishes that not only did the defendants not request pay-

ment, they made it very clear that the payments would not be necessary.[1]

To permit the convictions of Hobbs Act conspiracy in this case to stand would represent a substantial stretching of the definition of extortion, and a corresponding expansion of federal jurisdiction in derogation of the criminal jurisdiction of state courts. In my judgment, it is impermissible to treat federal jurisdiction thus doubly expansively: first by extending it to passive acceptance of gratuities by public officials, and second by extending it to purely hypothetical situations.

The guilty verdict on Count III of the Indictment will be vacated, and Count III will be dismissed for lack of jurisdiction.

II. RICO CONSPIRACY

In Count II of the Indictment, the defendants were charged with conspiracy to conduct the affairs of an enterprise, to wit, the law firm of Criden, Johanson, Dolan, Morrissey and Cook, of which co-defendant Howard Criden was a partner, through a pattern of racketeering activity, to wit, the payment of bribes to public officials.

1. The case of *U.S. v. Butler*, 618 F.2d 411 (6th Cir. 1980), cited by the Government, is not to the contrary, although the opinion does contain *dictum* to the effect that mere passive acceptance of a bribe by a public official can constitute extortion under the Hobbs Act, regardless of who initiates the request. Passive acceptance of a bribe can amount to tacit request for a bribe, or at least ratification of the notion that a bribe would advance the interests of the payor. The court did not address a situation involving repeated assurances by the public official that the payment was unnecessary. More importantly, the Government's evidence in that case was to the effect that the two defendants were working together, and that the kickback scheme originated with them. The "passive" receipt of a bribe expressly demanded by a co-conspirator can scarcely be regarded as truly passive.

The defendant Jannotti was acquitted on this count; the Government's own evidence tended to show that he was not even aware of the existence of the law firm, probably did not know that Howard Criden was a lawyer, and may very well have had no knowledge of bribery activities other than the single payment to him. The defendant Schwartz was convicted, and the question is whether the evidence adequately supports the verdict.

There was ample evidence that Criden engaged in a pattern of racketeering activity, that is, that he was involved in a series of bribes to public officials. And there was adequate and uncontradicted evidence to the effect that the law firm of Criden, Johanson, Dolan, Morrissey and Cook purchased supplies and equipment from out-of-state vendors, represented out-of-state clients, and acted as counsel in interstate transactions. Whether Criden's bribery activities occurred in the conduct of the affairs of the law firm is a closer question, as is the issue of Schwartz's knowing participation in a conspiracy having as its object the conduct of the affairs of that law firm.

The evidence makes clear that only three of the lawyers associated with the law firm mentioned in the Indictment had any knowledge of the illegal activities of Criden, or shared in the proceeds. Indeed, the law firm named in the Indictment appears to have been a loosely-structured, flexible arrangement, in which decisions as to whether particular fees belonged to the firm or to individual lawyers were made on an *ad hoc* basis, after the fact. Criden and Johanson received fees for their part in introducing the undercover agents to public officials who accepted bribe payments. Johanson received a bribe payment himself, and Criden both received payment from the undercover agents for his services, and, in some instances, received a portion of the bribe from the recipient of the bribe. Some of the money was distributed among Johan-

son, Criden and Cook, and some of it was placed in a safe deposit box to which only those three had access. On one occasion, when the law firm needed cash to meet its expenses, Criden arranged to have $2500 removed from the safe deposit box and paid to the firm, ostensibly as fees received from inactive corporations he controlled.

It is also reasonably clear that Criden, Johanson and Cook labored under the assumption that the law firm, or certain portions of the law firm, would be performing legal services for the Arabs' hotel enterprise and other business involvements in Philadelphia. Indeed, the prospect of such lucrative law business was an important part of the motivation of the three men.

Taken as a whole, I believe the circumstances established on this record permitted the jury reasonably to conclude that Criden's bribery activities were undertaken in his conduct of the affairs of the law firm. *See, e.g., U.S. v. Scotto* (2d Cir., Sept. 2, 1980), 28 Crim.L.R. 2026.

The conviction of Mr. Schwartz on Count II of the Indictment required proof that he knowingly participated in a conspiracy, one of the objects of which was Criden's conduct of the affairs of the law firm through a pattern of bribes. The defendant contends that, whereas the evidence does justify the inference that Mr. Schwartz knew that Criden was involved in at least two bribe transactions, those in which Schwartz and Jannotti received payments, the conclusion that Schwartz intended to aid Criden in conducting the affairs of Criden's law firm by that means is totally unfounded.

For many years Mr. Schwartz was a partner in a large center city law firm, which is now known as Blank, Rome, Comisky and McCauley (hereinafter "Blank, Rome"). He withdrew from the active practice of the law in about 1970 or 1971, and severed all connections with the firm

at that time. However, his son is now associated with that firm, and Mr. Schwartz himself continues to be personally friendly with various members of that firm. In the course of his meeting with the undercover agents, Schwartz was asked to recommend a law firm which, in his judgment, would do a good job in handling the legal affairs of the proposed hotel project. He mentioned three firms, one of which was Blank, Rome. Shortly thereafter, while having lunch with a partner in the Blank, Rome firm, Schwartz alerted him to the possibility that the Arabs might be interested in retaining Blank, Rome, and also explained that Criden apparently expected his own firm to share in the work, and in any fees which might be generated. It was agreed that Criden's law firm would not be able to participate, because Johanson, a member of City Council, was a member of that firm. There was no further discussion of the project with the Blank, Rome firm, but it appears that shortly thereafter, Criden and Cook discussed the possibility of severing their connection with the existing law firm, and joining Blank, Rome in some fashion, if the hotel project materialized, and if the Arabs should select Blank, Rome as their counsel.

I believe the evidence permitted the jury to conclude that the defendant participated in the bribe transaction with knowledge that Criden was also a participant, that Criden was engaged in a series of similar transactions, and that Criden's activities occurred in the course of his conduct of the affairs of Criden's law firm. In my view, it was not necessary for the Government to prove that Schwartz fully supported all of Criden's long-range goals. Moreover, there is authority for the proposition that proof of *scienter* and *mens rea* which suffices for conviction of the predicate offenses also suffices for conviction of RICO conspiracy based upon those predicate offenses. *U.S. v. Boylan*, 620 F.2d 359 (2d Cir. 1980).

The defendant, relying on *U.S. v. Elliott*, 571 F.2d 880 (5th Cir. 1978), argues that the Government was required to prove that he specifically intended to participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity, that is, it must be shown that the defendant himself participated in at least two acts of racketeering. Upon close reading of the opinion in that case, it is not altogether clear that the court goes that far; there is room for an interpretation to the effect that participation in a single act of racketeering, with knowledge that it was part of a pattern of similar acts, would suffice. Be that as it may, there was evidence in the present case from which the jury could reasonably have concluded that Schwartz had some involvement in the Jannotti bribe transaction as well as his own.

Taken as a whole, and viewed in the light most favorable to the Government, the evidence in this case sufficed to enable a reasonable jury to conclude, with the requisite assurance, that the essential elements of the crime charged in Count II of the Indictment were made out, as to the defendant Schwartz. It therefore becomes necessary to address the entrapment and due process defenses asserted.

III. Entrapment

A. *In General*

Discussion of the law of entrapment properly begins with a brief recapitulation of the decisions of the Supreme Court on this subject. In *Sorrells v. U.S.*, 287 U.S. 435 (1932), a prohibition agent, masquerading as a businessman-tourist, persuaded the defendant to obtain for him a half-gallon of whiskey. The defendant yielded to repeated requests, made in the course of a social gathering in which the prohibition agent emphasized his World War I military service in the same unit as the defendant. The Court

unanimously held that these circumstances, if established, amounted to impermissible entrapment. The majority, in an opinion by Chief Justice Hughes, took the position that Congress could not have intended the National Prohibition Act to apply to sales induced by govenment agents from otherwise innocent defendants, and held that the entrapment defense should have been submitted to the jury. The Chief Justice referred to

> ". . . the duty of the Court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers, and to preserve the purity of its courts." (287 U.S. at p. 446.)

The concurring opinion by Mr. Justice Roberts, in which Justices Brandeis and Stone joined, rejected the majority's statutory-intent analysis, but agreed that, if the facts were as asserted by the defendant, no conviction would be permissible. They felt that the issue was properly one for the Court, rather than the jury; the language of the concurring opinion suggests an admixture of due process and supervisory power concepts.

In *Sherman v. U.S.*, 456 U.S. 369 (1958), a government informant first met the defendant, a former drug addict, at the office of a physician who was treating both men for addiction-related problems. Thereafter, there were several accidental meetings (*e.g.*, at a drug store where both had their prescriptions filled) in the course of which the two became friendly, compared notes, etc. The informant pretended to be desperately in need of drugs, and repeatedly urged the defendant to obtain some for him. The defendant eventually yielded to these importunings, helped the informant obtain drugs, and became readdicted himself. It was at that point that the informant first contacted law enforcement agents about the defendant, although he had previously acted as in-

formant in other cases. The defendant had twice been convicted of drug-related offenses, several years earlier.

The entrapment issues were presented to a jury, which nevertheless convicted the defendant. The Supreme Court unanimously held that the conviction must be reversed, and that the Government's own evidence established entrapment as a matter of law.

The majority opinion, by Chief Justice Warren, cited *Sorrells,* and seems to have adopted its legislative intent rationale. The net effect of the majority opinion, at any rate, is that the line is to be drawn between trapping the unwary innocent, and trapping the unwary guilty, into the commission of a crime. Mr. Justice Frankfurter's concurring opinion, in which he was joined by Justices Douglas, Harlan and Brennan, rejected the legislative intent analysis of *Sorrells,* and the predisposition analysis of the majority, and urged adoption of an objective test, focusing upon the conduct of the government agents: if the conduct of the government agents was such as to be likely to cause a person of reasonably firm moral convictions to stray from the path of righteousness, the case should be dismissed. The standards of permissible governmental inducement should be the same for all defendants, whether predisposed or not.

In *U.S. v. Russell,* 411 U.S. 423 (1973), government agents furnished a chemical substance, P2P, not in itself contraband, to the defendant in order to enable him successfully to complete the unlawful manufacture of methamphetamine. In a 5-to-4 decision, the Court upheld the conviction. The majority opinion reaffirmed and clarified the *Sherman* and *Sorrells* holdings adopting the subjective approach, and ruled that creative involvement by government agents is not a defense which may be asserted by a predisposed defendant. The dissenters, in opinions by Justices Douglas and Stewart, argued for the

objective approach adopted by Mr. Justice Frankfurter in *Sherman*.

In *Hampton v. U.S.*, 425 U.S. 484 (1976), the defendant claimed that it was the Government which, through an informant, actually supplied the drugs which the defendant was prosecuted for distributing. It was conceded that the defendant was predisposed, and he therefore did not request a jury instruction on entrapment as defined by the majority in *Russell*. He did, however, specifically request a charge to the effect that, if the jury believed that the drugs had been supplied by the Government, there could be no conviction.

By a 5-to-3 vote, the Supreme Court upheld the conviction. The plurality opinion by Mr. Justice Rehnquist, in which Chief Justice Burger and Mr. Justice White joined, expressed the view that there can never be a successful entrapment defense if the defendant is predisposed, and that a defendant may be heard to complain that the conduct of government agents was so egregious as to amount to a violation of due process only if his own due process rights were violated.

Concurring in the judgment, Mr. Justice Powell, joined by Mr. Justice Blackmun, took the view that there may be situations in which the conduct of the Government is so outrageous as to preclude conviction of even a predisposed defendant; but that the case under consideration did not reach that level of outrageousness. The three dissenting Justices adhered to the objective analysis of entrapment, and viewed the defendant's conviction as a clear violation of his constitutional rights, and as calling for the exercise of the court's inherent supervisory power over the administration of justice.

Finally, although not directly pertinent, the recent decision in *U.S. v. Payner*, — U.S. —, 100 S. Ct. 2439, 65 L.Ed.2d 468 (1980) should be mentioned. In that case,

agents of the Internal Revenue Service hired a firm of private detectives to steal a briefcase from a third party, and helped them photograph numerous documents found therein. These documents led to the discovery of other evidence which formed an important part of the Government's case against the defendant. Conceding that the defendant lacked standing to assert Fourth Amendment issues, the trial court nevertheless, in the exercise of its supervisory powers, suppressed the evidence and set aside the conviction. The Supreme Court, in a 6-to-3 decision, reversed, and reinstated the conviction. The majority opinion, by Mr. Justice Powell, held that it was improper to invoke the court's supervisory power in these circumstances. Only persons whose own Fourth Amendment rights are violated have standing to invoke the exclusionary rule.

The guiding principles which emerge with clarity from these pronouncements of the Supreme Court include the following:

1. It is perfectly proper for law enforcement officials to engage in undercover activities, including deception and trickery, where both the purpose and effect of their activities is to enforce the law by ferreting out and exposing criminal activities. Entrapment issues arise only where the Government induces or persuades a person to commit a crime, or actually participates in the commission of the crime.

2. Under no circumstances is it permissible to convict of crime a non-predisposed defendant who was induced by government agents to commit the crime charged. No member of the Supreme Court has ever expressed any doubt as to the correctness of this principle, although varying reasons have been put forth from time to time for its justification.

3. A predisposed defendant may properly be convicted notwithstanding he was induced by government agents to commit the particular crime charged, so long as the inducement is not such as would be likely to cause a person of reasonably firm moral convictions to stray into criminality. For some members of the Court, this is true because, in their view, a predisposed defendant cannot successfully assert an entrapment defense under any circumstances. For other members of the Court, this is true because entrapment should be viewed as a matter of the objective reasonableness of the conduct of the government agents. Neither of these approaches is fully accepted by a majority of the Court. There is, however, majority acceptance of a middle ground, set forth in the following paragraph.

4. A predisposed defendant may properly be convicted notwithstanding governmental inducement or creative involvement, unless the conduct of the government agents was so outrageous as to violate fundamental concepts of fairness; that is, unless the conduct of the government agents was so outrageous as to be deemed a violation of due process. The converse of this statement, namely, that even a predisposed defendant cannot be convicted if the Government's conduct amounted to a violation of due process, probably also represents the view of a majority of the members of the Court, although some may regard it as still an open question, and it is probable that opinions concerning what is, and what is not, sufficiently outrageous conduct can be expected to vary.

There are several pertinent decisions of the courts of appeals which shed light upon the proper application of the principles established by the foregoing Supreme Court decisions to particular fact situations. Before proceeding to a discussion of these intermediate appellate decisions, certain general observations are in order.

The first is that decisions rendered before *Russell* and *Hampton* have continuing validity only insofar as they are consistent with those decisions.

The second, and perhaps less obvious, point is that the term "inducement" in the entrapment context is often used in a broad sense, to include very different forms of governmental activity; and that the Supreme Court's resolution of the objective-subjective controversy does not mean that the precise nature of the governmental activity alleged to constitute inducement in a particular case is no longer significant.

Most of the cases dealing with entrapment have been narcotic cases. Indeed, virtually all of the Supreme Court decisions on this subject have involved some form of contraband. Because of the special problems of detection and proof involved in narcotics cases, and because of the extreme danger to the public inherent in narcotics trafficking, it is plainly necessary to avoid placing undue restrictions upon the scope of permissible police activities in that area. Moreover, the likelihood that a truly non-predisposed person will be lured into crime of that type is relatively slight.

Entrapment involves both the activities of the government agents and the defendant's response to those activities. Under the general label "inducement" the reported decisions have included such diverse elements as suggesting that the crime be committed, providing some or all of the instrumentalities or facilities needed to complete the crime, actively participating in the commission of the crime, providing varying degrees of incentives, providing varying degrees of persuasion or even coercion, or a combination of these ingredients. The term "predisposition" has sometimes been interpreted to mean that the defendant was ready and willing to commit crimes of that type, and sometimes to mean that the defendant was ready, willing and able to commit crimes of that type.

In the wake of the *Russell* and *Hampton* decisions of the Supreme Court, it is probable, although arguably not altogether clear, that a defendant can no longer successfully assert that, although he was ready and willing to commit crimes of that type, he lacked the ability to carry out the crime until the government agents provided essential assistance. In *Russell*, for example, the chemical ingredient supplied by the Government was not readily obtainable from other sources. On the other hand, the rationale of the majority opinion in that case appears to have been based, at least in part, upon the proposition that the defendants might have been able to obtain the P2P from some other source. And in *Hampton*, the Court was plainly of the view that the defendants undoubtedly had other sources of supply.

Under both the subjective and the objective approaches to entrapment, the relationship between the conduct of the government agents and the response of the defendant continues to be important. The question still is, did the Government induce the defendant to commit a crime he would not otherwise have been likely to commit? As a practical matter, however, the fact that the actions of the government agents were themselves illegal will often have very little bearing upon their power to persuade. A non-predisposed defendant would ordinarily not be likely to be lured into crime merely by being made aware that others were willing to commit unlawful acts. Moreover, with respect to the kinds of crimes in which governmental participation in illegal conduct is most likely to be a necessary adjunct of law enforcement—narcotics, prostitution, and other "victimless" crimes—a rule precluding successful prosecution whenever the conduct of the government agents is shown to have been illegal would provide the sophisticated criminal with a ready means of determining whether a person he is about to deal with is or is not an undercover agent.

While the focus of the entrapment defense, in view of the Supreme Court's adherence to the subjective analysis of entrapment, is upon whether the defendant was or was not predisposed, it continues to be necessary to evaluate the conduct of the Government to determine whether it amounted to inducement in the first place. Once inducement is shown, the emphasis is upon predisposition, *i.e.*, the character of the accused. But it is not always possible to achieve complete compartmentalization in this context. That is, it is sometimes impossible to achieve a correct resolution of the predisposition question in total disregard of the nature of the governmental inducement.

A further point, implicit in the preceding discussion, must also be addressed, namely, the need to focus upon just what it is that constitutes the state of mind which can properly be characterized as predisposition, and what evidence suffices to establish it. The Supreme Court has thus far not had occasion to explore this subject in depth, and it has received very little attention in the courts of appeals' decisions. In *Russell* and *Hampton*, predisposition was conceded. In *Sherman*, without extended discussion, the Supreme Court unanimously held that the existence of two previous narcotics convictions, several years earlier, did not prove predisposition. In *Sorrells*, the Court held that evidence that the defendant had a reputation in the community as being a rum-runner did not rule out the possibility that he was not predisposed; the question was for the jury.

It is clear that we are concerned with the defendant's state of mind and inclinations before his initial exposure to the government agents. But the distinction between a predisposed and a non-predisposed state of mind is not necessarily clearcut. At one extreme is the defendant who customarily engages in this type of criminal activity as a way of life, and who enthusiastically embraces any addi-

tional opportunities for such activities. At the other extreme is the resolute individual who would not commit a crime of this type under any circumstances. In between are many gradations: the person who occasionally commits crimes of this type, and would be willing to do so again only if a particularly favorable opportunity should present itself; the person who has previously succumbed to temptation, but is making a sincere and concerted effort to resist such temptations; the previously innocent person who is weak and easily influenced. In his influential and relatively early article on entrapment issues, Professor Donnelly suggests distinguishing between situational offenders and chronic offenders, Donnelly: *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 Yale L.J. 1091, 1113 (1951), but that distinction does not appear to have been adopted, in terms, by the courts.

Moreover, the defendant's state of mind before the initial exposure to the government agents must be determined after the fact. Sometimes this poses no great difficulty, as where there is evidence of pre-exposure activities or declarations tending to establish the defendant's pre-existing criminal bent. But often, as in the present case, the sole proof of predisposition consists of evidence as to what the defendant did on the occasion in question, in response to the overtures of the government agents. In such cases, I believe it is particularly important to recognize that the defendant's response to governmental inducement must be viewed in light of the precise nature and extent of the inducement.

The foregoing analysis is entirely consistent with the pertinent Third Circuit decisions which survive *Russell* and *Hampton*. In the leading entrapment case in this Circuit, *U.S. v. Watson*, 489 F.2d 504 (3d Cir. 1973), the court held that "once there is sufficient evidence of Gov-

ernment inducement to commit the crime to entitle the defendant to go to the jury with an entrapment defense," the burden of proof is upon the Government to negate entrapment. There is no separate allocation of the burden of proof as between inducement and predisposition; the defense should be treated as a unit, with the Government having the burden of overcoming it. The court stated:

> "This conclusion is consistent with the Supreme Court's reaffirmation that the focus of the entrapment defense is on the predisposition of the defendant rather than on the nature of the police behavior. *U.S. v. Russell*, 411 U.S. 423, 429, 93 S.Ct. 1637, 36 L.Ed. 2d 366 (1973). Inducement does not become irrelevant to either party, to be sure, since the stronger the inducement, the more likely that any resulting criminal conduct of the defendant was due to the inducement rather than to the defendant's own predisposition. Under the unitary approach we require, inducement therefore enters as an element of predisposition which the Government must disprove, rather than as an independent element which the defendant must prove." (489 F.2d, at p. 511.)

See, also *Government of the Virgin Islands v. Cruz*, 478 F.2d 712 (3d Cir. 1973); *See also, U.S. v. Hill* (3d Cir., Nov. 25, 1980).

In *U.S. v. Armocida*, 515 F.2d 49 (3d Cir. 1975), the court held that there can be no entrapment defense unless there is both (1) evidence that government agents initiated the crime and (2) evidence suggesting that the defendant may not have been predisposed. In that case, a fairly routine purchase of drugs by undercover agents, the defendant did not testify, and neither the direct nor cross-examination testimony of the Government's witnesses revealed any reluctance on the part of the defendant-seller.

The court held that, while the record might support a finding that the Government initiated the crime, a charge on entrapment was unnecessary because of the absence of any colorable basis for questioning the defendant's predisposition.

The Third Circuit's formulation of the test for determining the presence of legitimate entrapment issues is generally consistent with the conclusions reached in other circuits. *See, e.g., Kadis v. U.S.*, 373 F.2d 370 (1st Cir. 1967); *U.S. v. Riley*, 363 F.2d 955 (2nd Cir. 1966).

While cases involving dealing in contraband provide the primary source of the developing law of entrapment, the general principles thus far discussed are not limited to contraband cases. Thus, in *Lopez v. U.S.*, 373 U.S. 427 (1962), where the defendant was charged with bribing an Internal Revenue Service agent, the fact that the initial offer came from the defendant led the Court to hold that entrapment issues need not have been submitted to the jury. *See*, also *Osborne v. U.S.*, 385 U.S. 323 (1966) (jury-tampering).

It seems clear that it is not automatically entrapment for a government agent to offer a bribe to a public official, *Scriber v. U.S.*, 4 F.2d 97 (6th Cir. 1925). In *Scriber*, an undercover agent offered, and paid, $20 to a customs official to facilitate illegal importation of whiskey. The court stated:

> "Nor can we see that the defense of entrapment, more accurately defined, can be applicable to a situation, where the offense charged is the accepting of a bribe by a public officer, and where the supposed instigators do nothing except to give the officer opportunity to accept a bribe, and to expose him to what might be called the ordinary degree of temptation to which such officers are likely to be subjected at any time in the

> daily discharge of their duties . . . The prohibition agents did nothing to overcome Scriber's shrinking or reluctance. So far as they observed, he did not shrink. In such a case as that, we think it clear that a crime, otherwise rightly to be inferred, cannot be escaped by the aid of this defense" (at p. 98).

In a footnote, the court observed that the amount of the bribe was "not a substantial temptation to a first offense." The court thus appears to have left open the possibility that an unusually generous bribe offer might justify the conclusion that the defendant was impermissibly lured into crime.

Finally, it should be noted that, contrary to some of the assertions of the defendants in this case, the Government is not required to prove that its undercover investigation of the defendant was based upon probable cause to believe he was engaged in illegal activity, *U.S. v. Catanzaro*, 407 F.2d 998 (3d Cir. 1969); and that hearsay evidence is not admissible to prove predisposition. *Id.*, at pp. 1000-1001.[2]

B. *The Entrapment Defense in This Case.*

The undercover operation which has come to be known as Abscam was established initially by F.B.I. agents working out of the Hauphaug, Long Island, office of that agency, in conjunction with a career swindler named Melvin Weinberg, whom they had recruited for the task. While the details of the ruse varied from time to time, as the result of improvisation by various undercover agents, the broad outlines of the scheme remained fairly constant: The undercover agents represented one

2. For a comprehensive review and analysis of entrapment doctrine, see Parks: "The Entrapment Controversy," 60 Minn.L.Rev. 163 (1976).

or more extremely wealthy Arab sheiks desirous of investing huge cash resources in this country. Arrangements were made with the Chase Manhattan Bank, so that anyone who inquired would receive vertification that the Arabs did indeed have more than $400 million on deposit with that institution. Mr. Weinberg would "spread the word" through his underworld contacts and other shady connections. It was contemplated that persons expressing interest in providing investment opportunities would be carefully screened; if the proposed deal appeared legitimate, no further action would be taken, but if there was reason to suppose it might provide an opportunity for discovering criminality, the matter would be pursued, and the participants videotaped or otherwise electronically recorded. In actual practice, however, as discussed below, the distinction was not always carefully observed.

Angelo Errichetti, the Mayor of Camden, New Jersey, was an early target of the investigation, and brought most of the other targets to the attention of the investigators. Long active in political affairs in New Jersey, as a State Senator, as a party leader, and as Mayor, Mr. Errichetti represented himself as having extensive underworld contacts, and as possessing a great deal of information concerning the corruptibility of public officials. For present purposes, it is unnecessary to attempt to distinguish between solid fact and hyperbole. It suffices to state that the F.B.I. agents had reasonable grounds for believing that Mr. Errichetti was predisposed, had underworld contacts, and was thoroughly corrupt. Mr. Errichetti's unabashed pursuit of opportunities for financial reward apparently led the undercover agents to the easy, but unjustified, assumption that anyone introduced to them by Mayor Errichetti could automatically be regarded as equally corrupt.

Mr. Weinberg was strongly motivated to produce results for his F.B.I. employers. At the time he was recruited, he faced a substantial prison sentence on charges of mail fraud, covering transactions which had netted him in excess of $100,000. The F.B.I. interceded with the sentencing judge, and arranged to have Mr. Weinberg placed on probation. It was also agreed that Weinberg would receive substantial compensation, plus reimbursement of expenses and other fringe benefits, during his Abscam employment. He thus had a direct financial stake in the continuation and expansion of the Abscam investigation. Moreover, the aura of wealth, expensive living, and free spending, and the probable limited duration of his employment, were not without their own temptations for one who, at other stages of his career, probably represented the archetypical amoral fast-buck artist.

Mr. Weinberg and the undercover agents were unstinting in their efforts to present a realistic image of great wealth: they entertained on a yacht in Florida, they rented a townhouse in Georgetown, they occupied a $365-per-day hotel suite in Philadelphia and equally lavish accommodations in New York, they traveled by private jet and in chauffeur-driven limousines.

At this point, it is appropriate to observe that, while the circumstances thus far discussed could be regarded as providing a singularly attractive opportunity for soliciting improper payments—the agents were free-spenders, their resources appeared virtually limitless, and Americans generally viewed oil-derived Arab wealth with resentment—if the agents had merely awaited such solicitation, it is doubtful that entrapment issues would have arisen. But the investigation had two additional characteristics which cast a quite different light upon ensuing developments.

Perhaps the crucial aspect of the undercover operation was its emphasis upon "the Arab mind," "the Arab

way of doing business." A constant theme of the agents' representations was that their principals would not undertake any project unless first assured of the "friendship" of the persons with whom they were dealing. They were impressed with titles, with persons in official positions of power and influence. Their concept of "making friends" was that money had to be paid. At least insofar as the Philadelphia aspects of the investigation were concerned, there was no suggestion that the putative sheik required or expected any violation of the law in exchange for the payment; he merely wished to be assured that he had "friends" in high places.

A concomitant feature of the investigation was the question of precisely where the loyalties of the sheik's representatives lay. Mr. Weinberg and the undercover F.B.I. agents made it clear that their sole aim was to please their Arab employer by being able to tell him truthfully that which he was interested in hearing, namely, that money had been paid to high officials. The agents did not require any commitment that the public official would actually be influenced by the payment; they were interested only in appearances.

Two examples illustrate the extent to which the agents were prepared to go. United States Senator Harrison Williams, a 30-year veteran of the Senate, was interested in obtaining financing for a titanium venture in which he or members of his family had an interest. His concept was that, by installing improved equipment, an American titanium mine could produce titanium needed by a nearby paint manufacturer at a lower price than the paint company's overseas suppliers. In short, he was seeking financing for an entirely legitimate business proposition. Throughout the preliminary discussions, Senator Williams made it very clear that the venture would not be dealing with the United States Government, and that

he neither could nor would be in any way involved with government contracts. Ostensibly, the financing arrangement was eventually structured in such a way as to produce a substantial profit to the Senator from the equivalent of a sale of his original interest to a new venture which included the Arab investors. Throughout these negotiations, Senator Williams repeatedly rebuffed suggestions from the undercover F.B.I. agents about various ways in which these profits might be concealed from the Internal Revenue Service. Eventually, the senator was told that, before finally approving the transaction, the sheik wished to meet with him. Immediately before meeting the sheik, Mr. Weinberg engaged in an extensive coaching session. In effect, the Senator was told that, whereas both he and the representatives knew that the proposed venture was entirely legitimate, that it would not involve government contracts, and that the Senator had not agreed to and would not be expected to use his official position to advance the interests of the enterprise, it would be helpful if the Senator were to impress the sheik with the importance of his position in the Senate, and his knowledge of other important persons in the Government.[3] Senator Williams was then ushered into another room to

3. It is undisputed that the tape recording of this conversation was delivered to the F.B.I. agents within an hour or so after the conversation took place. It is also undisputed that Mr. Weinberg was never cautioned against employing the same technique with other potential targets. Even more disturbing is the fact that, in a pre-prosecution memorandum dated December 12, 1979, and submitted to his superiors in the Department of Justice by Thomas Puccio, Esq., the attorney from the Brooklyn Strike Force who was in charge of the Abscam investigation, no mention is made of Weinberg's coaching of Senator Williams; only the tape of the actual meeting with the sheik is referred to. On the basis of an in camera inspection of documents shielded by executive privilege, however, it is clear that Mr. Puccio was aware of the coaching incident.

meet the sheik, before the hidden TV cameras. After pointing out the merits of the proposed business deal, Senator Williams did brag about his long tenure in the Senate and his many contacts in Washington.

The second example arose after it had been made clear to Errichetti and to Howard Criden that there was money to be made by merely arranging introductions of officials who would present themselves as corruptible, irrespective of their genuine inclinations. Criden and Errichetti arranged to have Ellis Cook, Esq., a young lawyer associated with Criden, introduced to the undercover agents as a (named) official in the New Jersey office of the Immigration and Naturalization Service. The plan was that Mr. Cook would accept the agents' largesse and later share it with Criden and Errichetti. The attempted impersonation was exposed, however, when the agents noted that Mr. Cook was too young for the part he was playing. Notwithstanding the attempted deception, the agents continued to avail themselves of the services of both Criden and Errichetti in arranging further introductions; they merely exercised greater care in obtaining independent verification of the identity of the persons brought in for interviews.

The two examples just discussed did not, of course, directly involve the defendants Schwartz and Jannotti, but they are noteworthy parts of the background against which are to be evaluated the Government's assertions—in public statements by officials of the Justice Department, and in arguments made in the course of the trial of this case—that the undercover agents reasonably and in good faith relied upon the "middlemen," Criden and Errichetti, to bring in only persons already corruptible, and that the undercover agents neither intended to, nor did, bring in for surreptitious filming persons presenting legitimate business proposals.

The actual Philadelphia aspects of the Abscam investigation developed as follows: Howard Criden and Louis Johanson were partners in a small Philadelphia law firm. Johanson was also a member of the Philadelphia City Council. The two attorneys represented a client who held an option to purchase certain land in Atlantic City, New Jersey, believed to be a suitable site for a casino. The attorneys were employed, on a generous contingent-fee basis, to obtain financing for the development of the site. Johanson played golf at a New Jersey country club. He mentioned the casino proposal to another member of the club, a casual acquaintance named Meiler, a successful Philadelphia businessman. It happened that Mr. Meiler had a summer home at the seashore near the summer home of Mayor Errichetti. In the course of earlier discussions between Meiler and Errichetti stemming from Meiler's interest in obtaining dockside storage facilities in Camden, Meiler had been made aware of Errichetti's supposed access to wealthy overseas investors. Meiler arranged a meeting between Johanson and Criden and the Mayor. Criden and Johanson were later advised that the sheik's representatives were interested in the proposed project, and Criden and Johanson were invited to the yacht in Florida to present the proposal to the sheik's representatives.

It is undisputed that the casino proposal of Criden and Johanson was a perfectly legitimate business proposition. At the meeting on the yacht, Criden presented preliminary plans for the project, and was led to believe that the sheik would be very much interested in providing the necessary financing. The discussion of the casino project on that occasion was electronically recorded, and the transcript reveals no suggestion of illegality or impropriety. Thereafter, however, there was a further discussion, not electronically recorded, in which the undercover agents for the first time broached the subject of the sheik's

interest in the possibility of becoming a permanent resident of this country, in the event of adverse political developments in his home country. It is agreed that Johanson was not present during this latter conversation. There is considerable uncertainty as to whether Criden was present; if so, he did not participate. On the return trip to Philadelphia, Mayor Errichetti told Criden of the agents' interest in meeting members of Congress or other officials who might provide assistance with immigration problems. Errichetti informed Criden that, on the basis of his previous experience with the sheik's representatives, and incredible as it might seem, the representatives would pay substantial sums of money for merely being introduced to important people to whom the representatives could pay money without asking or receiving any "*quid pro quo.*"

For the next several months, Criden, Johanson and Errichetti were instrumental in arranging meetings between various congressmen and the sheik's representatives. A substantial factor in the motivations of Criden and Johanson was their desire to remain in the good graces of the persons who, they believed, were going to finance their casino project, from which the two lawyers hoped to earn a contingent fee in excess of $1 million. In part, also, they were motivated by the generous financial rewards they derived from sharing in the sums paid the public officials, and, later, by receipt of direct payments from the representatives for their services in arranging introductions.

Because Criden and Johanson, and two of the congressmen, were from Philadelphia, the United States Attorney in this District was made privy to the progress of the Abscam investigation. By this time, Mr. Criden was emulating Mayor Errichetti in his professions of extensive knowledge of political corruption and underworld activities in the Philadelphia area, and Mr. Vaira (the U. S. Attorney in this District) was anxious to avail himself of the Abscam

device here in Philadelphia. For various reasons, the entire investigation was about to be terminated; Mr. Vaira and the Philadelphia F.B.I. office were authorized to pursue the Abscam investigation in this area, but only for a period of 10 days.

The technique by which the investigation was shifted to the Philadelphia area was relatively simple: Mr. Weinberg informed Criden that the sheik had expressed interest in establishing a base of operations in Philadelphia, and that Criden would be receiving a call from a new representative of the sheik (actually, F.B.I. Agent Wald) who would be handling matters for the sheik in this respect.

In their initial, videotaped, meeting, undercover Agent Wald explained to Criden that the sheik was interested in building a hotel complex in Philadelphia, and might also be interested in major long-range projects having to do with the revitalization of Pennsylvania's coal industry and related major improvements along the Philadelphia waterfront, but only if, in accordance with the normal workings of "the Arab mind" he could be assured of the friendship of important governmental officials. Criden suggested the agent might wish to discuss these matters with the two Philadelphia congressmen previously involved in their immigration discussions, Congressmen Myers and Lederer. The agent pointed out that his principal was sufficiently sophisticated to know the distinction between federal matters and local matters, and that the kind of zoning and similar problems which might be encountered in building a hotel would be within the province of city officials. The agent inquired as to the extent of Criden's familiarity with officials of the City of Philadelphia. Criden reminded the agent that his partner, Johanson, was a member of City Council, and it was agreed that Mr. Johanson would be brought in for a meeting with the undercover agent to discuss the hotel project. Criden also reviewed with the agent

the identities of various important persons in the city government, including the Mayor and the President of City Council, the defendant Schwartz, and the Majority Leader, the defendant Jannotti. Asked if it would be possible for the agent to meet and "deal" with these individuals, Criden advised against meeting with the Mayor (because he had just assumed office, and was an "all-American boy" type), but stated he would find out whether Schwartz and Jannotti would be willing to meet with the representative.

Asked what the amount of any payment to the City councilmen should be, Criden responded, "You tell me." After some further discussion, it was agreed that, since payments to the congressmen had been on the order of $50,000 each, a figure of $30,000 would be appropriate for the President of City Council, and lesser sums for the other two councilmen. Criden assured the agent that, unless each individual agreed in advance to accept the money, no meeting between the representative and that individual would be arranged. It is also a permissible inference that, as between Wald and Criden it was understood that it would be improper for a councilman to accept such payments.

Criden promptly arranged a meeting between Johanson and the agent, at which Criden was also present. Following a lengthy dissertation by Johanson concerning the desirability of the proposed hotel project, the undoubted willingness on the part of all city officials to cooperate in seeing it become a reality, and his own willingness to support the project without receiving money, and further discussion by the agent of the Arab mentality and his principal's attitude toward business of this kind, it was agreed that the financial arrangements had already been discussed between Criden and Johanson to Johanson's complete satisfaction. Johanson thereupon was paid $25,000 in cash, and left the meeting. Criden was there-

upon paid $5,000 in cash for his services in arranging the meeting.

Criden was presented with a problem insofar as the defendant Schwartz was concerned. In the course of his discussions with the undercover agent, Criden had professed to be a long-time friend and colleague of Schwartz, although he stated he did not know whether Schwartz would be interested in accepting money. Actually, however, Criden had never met Schwartz, and Schwartz had barely heard of Criden. Criden thereupon enlisted the aid of Common Pleas Court Judge Shiomos, a friend of Criden's who lived in the same apartment house as Schwartz, to arrange a meeting.

According to the Government's evidence, Schwartz was told that the sheik's representatives wished to obtain Schwartz's expert advice concerning the workings of city government, the procedures for obtaining the necessary governmental approvals, etc., and would be willing to pay him a $30,000 consulting fee.

As between Criden and Schwartz, it was apparently understood that Schwartz would be expected to remit a portion of the $30,000 fee to Criden, as a forwarding fee. As between Criden and Judge Shiomos, it was agreed that Judge Shiomos and an insurance broker named Kattleman, a friend of Shiomos who played a role in arranging the meeting with Schwartz, would each receive $3,000 for their services. According to Judge Shiomos, however, the entire $6,000 was for Mr. Kattleman since Judge Shiomos, in view of his position, was not permitted to accept fees for legal services; Judge Shiomos permitted Criden to believe that he was accepting the $3,000 for himself, so as to increase the share of his friend Kattleman who was in poor health and needed money.[4]

4. Kattleman did not testify at the trial.

By way of further background, it should be explained that Criden and Judge Shiomos had previously discussed the possibility of Shiomos' association with Criden's law firm at the expiration of the judge's current term of office. Shiomos' interest in such an arrangement was greatly enhanced when Criden told him about the proposed casino project and the proposed hotel and other Philadelphia projects.

Judge Shiomos arranged to meet with Mr. Schwartz. His version of that meeting was as follows:

> "I said [Criden] had some clients that were very wealthy. They were Arab clients, that they had about $400 or $500 million in New York and they wanted to invest $150 million to build a hotel here . . . I mentioned to him that if he is willing to discuss it any further that I would call Mr. Criden and have him call him.
>
> "I indicated to Mr. Schwartz that Mr. Criden said there would be a fee and that Mr. Criden expected part of that fee . . . There would be a fee for Mr. Schwartz for his advice.
>
> "Q. And what did Mr. Schwartz say in response to that?
>
> "A. Mr. Schwartz indicated at that point—all he said, 'I would be interested in anyone who is willing to invest $150 million.'" (Trial tr. 3.137-38.)

It was agreed that Shiomos would have Criden telephone Schwartz to arrange a meeting. As he was leaving, Judge Shiomos commented to Mr. Schwartz that he did not believe there was anything improper in the proposed transaction, and that if Mr. Schwartz thought there was "anything improper or fishy," he would be in a position to judge for himself after meeting with Mr. Criden.

Since neither Criden nor Schwartz testified at trial, there is no direct evidence about the contents of their discussion. However, Schwartz accompanied Criden to a meeting with the undercover agents on January 23, 1980, and the videotape of that meeting, together with other evidence, demonstrates that Schwartz knew he would be paid $30,000, and that the payment would be shared in some way with Criden.

The transcript of the meeting between Schwartz and the undercover agents is entirely consistent with the "consulting fee" theory: Schwartz explained at some length the political make-up of the city government, the various agencies that would deal with various aspects of such a project, the lines of authority within the city government, and the political power structure in Philadelphia. He made it very clear that the proposed project would be warmly received, that he could foresee no obstacles, and that any minor problems which might arise could easily be solved. Much of the discussion concerned which law firms in the city were experienced in handling major real estate developments, and Criden's anticipated role in working with the law firm designated.

Agent Wald repeatedly asked for assurances that the project would encounter no "problems," and Schwartz repeatedly assured him that the project appeared to be entirely legitimate and beneficial for the City, and that it would have his support. Schwartz made it clear that he controlled the City Council, and that his predictions concerning the absence of difficulties could be relied upon. When the agent expressed his satisfaction with the results of the meeting and produced the envelope containing the money, Criden assured him that the amount had been discussed with Schwartz and was satisfactory to him, and Schwartz stated that he was not primarily interested in the money, but in the benefits the project would have for the people of Philadelphia.

Schwartz's words and actions during the meeting, as disclosed on the videotape, can be interpreted in either of two ways: (1) that he was rendering legal advice and advice as an expert on city government and real estate development, in exchange for a consulting fee. Under that interpretation, his bragging about his control over City Council and entree to all other departments of city government was intended to assure the "client" that he knew what he was talking about, and that his advice was sound. Under that interpretation, Schwartz was merely violating the City Charter's prohibition against conflicts of interest, or attempting to circumvent these requirements on the theory that general advice about city governmental matters is distinguishable from actual representation of clients before city agencies. Or (2) that he was accepting a bribe for assuring his official support of a project he would have been willing to support in any event. Under that interpretation, his bragging about his control of city government was designed to assure the bribe payers that their money was well spent. It is apparent from the verdict that the jury chose the latter interpretation.

In part I of this Opinion, it has been determined that the sole count of the Indictment on which the defendant Jannotti was convicted should be dismissed for lack of jurisdiction. Since the Government may wish to appeal that ruling, however, it is appropriate to address the entrapment issues as they relate to Jannotti, as well as Schwartz.

Mr. Jannotti met with the undercover agents, together with Criden, on January 24, 1980. Before arriving at the meeting, he had been briefed by Criden and Schwartz. Agent Wald repeated, several times, his explanation of the peculiar psychology of his Arab employers, and their "way of doing business." Jannotti sought and received assurances about the nature of the project, and its legitimacy. Jannotti's reaction is typified by his comment,

early in the conversation, "Who could refuse a project like that?" (Trial Tr. p. 4.56.)

The agents kept pressing for responses which would demonstrate Jannotti's willingness to sell his vote, but these efforts met with little success. At one point, it appeared that the agents had succeeded. The following exchanged occurred:

> "WALD: Alright, when we're paying good money . . . substantial amounts here at this point to ah, ah, insured we'd got some friends in City Council, if we have a close vote on a situation we can, we can ensure—
>
> "JANNOTTI: My vote, my vote will be there."

But this was immediately followed by the following exchange:

> "WALD: That after conducting business this evening that . . .
>
> "JANNOTTI: My vote will be there because as I said the project is legitimate.
>
> "POULIS [F.B.I. agent]: Yeah, well, we know that we are going to be legitimate.
>
> "JANNOTTI: That's right.
>
> "POULIS: But like, like I was saying before you know—
>
> "JANNOTTI: I would vote for a legitimate project regardless." (Trial Tr. p. 4.78-4.79)

Other statements by Jannotti are to the same effect:

> "JANNOTTI: . . . We'll be there, we'll be there trying to do everything we can for you . . . No problem with that because it's as I say before a legitimate project, when you are coming in, I would go to bat with, without (p. 4.85)

. . .

> "JANNOTTI: Whatever George [Schwartz], whatever George had told you yesterday, I mean I am his righthand man and I . . . Whatever George had said to you I'll go along . . . We work together you know." (pp. 4.86-4.87)

Jannotti's attitude toward the payment of money is summed up in his statement, after one of Wald's references to the Arab psychology and way of doing business:

> "Well, you know eh, just on the basics of what you said and what they want to do, it's enough for me to get on the floor and argue. I don't have to, even care what else they want to come up with. My basic point is, the fact that eh, ah what's coming in here, and this has been our job, to bring as much business and, eh tax base and employment to the City of Philadelphia. If that's the way they want to do business, that's all right too." (Trial Tr. pp. 4.64-4.65)

When, at the close of the interview, the agents handed Jannotti an envelope containing $10,000 in cash, and sought to obtain his acknowledgement that he knew the amount of money in the envelope and was satisfied with the arrangement, Jannotti stated, on three different occasions, "We won't even discuss it" (p. 4.88).

It is the basic position of the Government that, since both of the Philadelphia congressmen who had earlier accepted payments for assistance in immigration matters had expressed interest in having the Arabs invest in worthwhile projects in their respective districts, and since Criden had bragged about his contacts with highly placed officials in the city government, the fictitious hotel project was put forward for the purpose of determining which officials would have to be dealt with on a corrupt basis

in furtherance of such a project. Ostensibly, the aim was to learn which city officials would ask for payoffs. But the evidence plainly makes that theory completely untenable: Neither Schwartz nor Jannotti asked for money; both made it clear that no payments were necessary; the idea of paying money originated with the agents; and it was the agents who insisted that, unless the payments were accepted, their principals would be unwilling to proceed with the project in Philadelphia.

It is thus very clear that neither defendant could properly be convicted unless the evidence proved predisposition beyond a reasonable doubt. And in my judgment, there is no evidence whatever in this case tending to show that, when the Government's overtures first came to the attention of the defendants, they were already predisposed to accepting bribes. The Government made no attempt to establish predisposition through extrinsic evidence. Both defendants presented impressive evidence of a good character, none of which was challenged by the Government. For proof of predisposition, the Government relies exclusively upon the fact that each defendant did accept money.

Ordinarily, of course, if the Government induces a defendant to commit a crime, the Government cannot establish predisposition merely by showing that the defendant did commit the crime. If that were sufficient, there would never be any need to prove predisposition, and there would be no such thing as an entrapment defense. In some situations, however, a defendant's ready acquiescence in the Government's suggestion may be enough to justify a finding of predisposition. Or, in the course of committing this particular offense, a defendant may exhibit such familiarity with criminal techniques and procedures as to demonstrate previous experience with similar criminal activity. In the present case, neither de-

fendant said or did anything tending to establish pre-existing criminal inclination, other than his acceptance of the money.

In my opinion, in their zeal to make sure that the defendants would accept the tendered payments, the government agents offered such attractive inducements as to preclude any reliance upon the defendants' acceptance of the money as proof of predisposition. In the first place, the amounts offered were exceedingly generous. Standing alone, the very amounts of the bribes were, to paraphrase the language of the court in *Scriber v. U.S., supra,* "a substantial temptation to a first offense."

In the second place, it was clear that the defendants would not be asked or expected to do anything improper on behalf of the proposed hotel venture; and they agreed to do nothing inconsistent with their obligations as members of the City Council, working for the benefit of their constituents.

Finally, and most importantly, they were led to believe that if they did not accept the money, the project would not come to Philadelphia. In the context of the fiscal crises which beset all large cities these days, and in the context of the problems of urban blight and decay, the governmental inducement in this case was indeed calculated to overwhelm.

Viewed in its entirety, the Philadelphia aspect of the Abscam investigation was plainly designed not to expose municipal corruption, not to determine which officials were corrupt, but merely to ascertain whether, given enough inducement, city officials could be corrupted. And what the Government succeeded in proving was, not that the defendants were corrupt city officials, but that, exposed to strong temptation, they could be rendered corrupt. In short, the evidence establishes entrapment as a matter of law. The evidence was, as a matter of law,

insufficient to establish the defendants' predisposition beyond a reasonable doubt.

The defendants are therefore entitled to judgments of acquittal, unless the Government is correct in its remaining contentions, namely, that the defendants are precluded from raising an entrapment defense because they did not concede every essential element of the crimes charged against them; and that, in any event, the defendants responded to inducements offered by Howard Criden, not by the Government. These contentions will now be addressed.

Availability of the Entrapment Defense. It has been the consistent position of the Government throughout this case that the defendants were not entitled to assert the defense of entrapment at all, since they did not concede every essential element of the crimes charged against them. Specifically, the defendants did not concede that their receipt of the payments from the undercover agents amounted to extortion under the Hobbs Act, nor did they concede the jurisdictional element of potential impact upon interstate commerce under that Act, or the enterprise and pattern elements of the RICO conspiracy charge. The Government relies upon a series of cases in this circuit which, at first blush, appear to stand for the broad proposition that, in order to raise an entrapment defense, a defendant must admit each and every essential element of the crime charged. *U.S. v. Watson,* 489 F.2d 504 (3d Cir. 1973); *Government of the Virgin Islands v. Hernandez,* 508 F.2d 712, 1717 (3d Cir. 1975) (footnote); *U.S. v. Levin,* 606 F.2d 47 (3d Cir. 1979); *U.S. v. Shoup,* 608 F.2d 950 (3d Cir. 1979). Here again, however, the decisions must be read in the light of the facts of the cases being decided. In *Watson,* the court held that a defendant charged with unlawful use of telephone facilities in carrying out a narcotics conspiracy could not claim en-

trapment if he denied having made the telephone call in question. In both the *Hernandez* and *Shoup* cases, the defendants contested every essential element of the crimes charged. The *Levin* case holds merely that a defendant is not entitled to an entrapment charge unless he expressly raises the entrapment defense in a timely fashion, so that the Government will have an opportunity to confront the issues at trial.

In none of the cited cases, nor in any other case that has come to my attention, has the Third Circuit Court of Appeals been squarely presented with the question of the availability of an entrapment defense to a defendant who, while admitting the operative facts, disputes *mens rea*, or challenges a jurisdictional element. I am reasonably confident that, properly understood, the Third Circuit cases go no further than to establish that a defendant must admit whatever action he claims to have been entrapped into performing.[5]

Some hypothetical examples may be useful: Suppose that an undercover government agent posing as a physician in the throes of a heart attack on a public street induces a passing nun to deliver a package, representing that the package contains life-saving medicines urgently required by a patient. The package actually contains heroin. Must the nun admit that she knew the package contained heroin, in order to assert the defense that she was entrapped into making the delivery? Surely not.

Suppose a defendant breaks into a house late at night, in response to frantic calls for help from an occupant who, it turns out, is a government agent merely pretending distress in order to ensnare. I do not believe the defendant would have to admit he intended to commit a felony in

5. So far as I am aware, no support for the Government's position is to be found in any decision of the Supreme Court.

order to claim entrapment as a defense to a burglary charge.

I have no doubt that, if squarely confronted with the issue, the Third Circuit Court of Appeals would find persuasive the reasoning of Judge Hufstedtler, writing for an *en banc* court which was unanimous on these issues, in *U.S. v. Demma*, 523 F.2d 981 (9th Cir. 1975). As noted in that opinion, rigorous enforcement of a rule requiring a defendant to admit every essential element of the offense in order to plead entrapment would be in direct conflict with the decision of the Supreme Court in *Sorrells v. U.S.*, 287 U.S. 435 (1932) and the later entrapment cases (holding that the entrapment defense may be asserted under a plea of not guilty, and need not be specially pleaded as a plea in bar), and would also raise serious constitutional questions.

As I understand it, the justification for the general rule advanced by the Government stems from the notion that a defendant should not be permitted to blow hot and cold; while inconsistent defenses may generally be permissible in criminal cases, there is an exception when the conduct of law enforcement officers is attacked. While this rationale is not universally accepted (for example, it was rejected by a majority of the court in *Demma*), I believe it does reflect the current state of the law in this circuit. But I am satisfied that our Court of Appeals would not extend the rule beyond its justification, to preclude assertion of an entrapment defense where no inconsistency would be involved.

The gist of the entrapment defense is that the Government improperly induced the defendant to commit a crime when, in the absence of such inducement, the defendant would not have been likely to commit that crime or any other crime of that type. In order to sustain a conviction, the Government must prove each and every essential ele-

ment against the defendant beyond a reasonable doubt. There is neither factual nor legal inconsistency when a defendant takes the position, "I do not agree with the Government's claim that I performed acts A and B. I admit that I did do act C, but I was entrapped into doing it." If acts A, B and C are all essential ingredients of the crime charged, the defendant is entitled to acquittal if there is a reasonable doubt as to any of the essential elements, that is, reasonable doubt as to whether he committed acts A or B, or reasonable doubt as to whether his performance of act C was the result of entrapment. Any contrary rule would do violence to fundamental constitutional concepts.

Moreover, it should be noted, a contrary rule would provide a powerful incentive to prosecutors to multiply or exaggerate the charges whenever the circumstances might suggest the existence of a legitimate entrapment defense.[6] It should be noted, also, that the entrapment defense provides protection only with respect to those acts the defendant was entrapped into performing. For example, a drug user who is entrapped into distributing can still be convicted of the possessory offense, or any other lesser included offense not tainted by the entrapment.

In the present case, neither defendant has taken a truly inconsistent position. Both defendants admitted performing the acts which they claim they were entrapped into performing. They were therefore not precluded from asserting the entrapment defense.

Governmental Responsibility for Inducement. The Government is undoubtedly correct in its assertion that a

6. It should be noted that, even under the Government's theory, the entrapment defense would be available with respect to the predicate offenses under RICO. If the Government were correct, it would mean that defendants who were entrapped into committing bribery under state law could be deprived of the defense by the simple expedient of charging them under federal statutes such as RICO and the Hobbs Act.

person induced to commit a crime by a third party not acting at the direction of the Government cannot assert the entrapment defense. *Crisp v. U.S.*, 262 F.2d 68 (4th Cir. 1958); *and see U.S. v. Twigg*, 588 F.2d 373 (3d Cir. 1978). But that rule has no application in the present case, since (1) Criden acted with the knowledge and largely at the direction of the government agents, and the government agents were the source of the representations which created the inducement, (2) the agents plainly had knowledge of, and ratified, Criden's representations, and (3) in any event, the conduct of the agents themselves, in their dealings with the defendants, constituted entrapment, in and of itself.

In *Sherman v. U.S., supra,* the Supreme Court unanimously held that there was entrapment as a matter of law, even though the Government had no knowledge of the inducement (by a third party informant) until after it had occurred. As set forth in Note, "The Defense of Entrapment," 73 Harv.L.Rev. 1333:

> "When persons who are not law enforcement officials act with official encouragement or assistance, they should be treated as government agents for purposes of the entrapment defense. Otherwise, its protection could be avoided by indirection [at p. 1341, citing *Sherman*] . . .
>
> "Most cases accept without discussion the proposition that persons promised rewards by the police for procuring arrests are government agents [ftn., at p. 1341] . . .
>
> "The only two cases which have been found dealing with the question of Government inducement of a third party to procure the commission of a criminal offense by a particular defendant when the third party has no knowledge of the law enforcement object of the inducement have held that the third party is a

> government agent for purposes of the entrapment defense. Despite his lack of intent to secure the defendant's arrest, his agency in such a situation seems apparent [at pp. 1341-42, citing *U.S. v. Klosterman*, 248 F.2d 191 (3d Cir. 1957); *U.S. ex rel. Hassell* [*Hassel*] *v. Mathues*, 22 F.2d 979 (E.D. Pa. 1927)]."

I am satisfied therefore, that the Government must be held responsible for the entrapment disclosed by the evidence in this case.

IV. Due Process

As discussed in Part II of this Opinion, a majority of the members of the Supreme Court have expressed views which leave open the possibility that even a predisposed defendant must be acquitted if the conduct of the government agents was so outrageous as to amount to a violation of due process. To date, the Supreme Court has not yet found it necessary to dispose of any case on that basis, although it is perhaps arguable that some of the earlier entrapment decisions, and several lower court decisions purporting to apply supervisory-power analysis, have roots in due process concepts.

In *U.S. v. Twigg*, *supra*, a case decided after *Russell* and *Hampton*, the Court of Appeals for the Third Circuit reversed a conviction and dismissed the indictment, on due process grounds, because of excessive creative involvement on the part of the Government. In that case, the Government supplied essential ingredients and equipment, and government agents were the prime movers in setting up and operating an illicit methamphetamine laboratory. And in *U.S. v. Archer*, 486 F.2d 670 (2d Cir. 1973), cited with approval in the concurring opinion in *Hampton*, the court expressed the view that dismissal on due process grounds would be appropriate where the undercover work of the government agents included the commission of sev-

eral independent crimes, including perjury before a grand jury.

The rationale of the *Twigg* decision appears closely related to the rationale of typical entrapment cases. Although the court made clear that its decision was *not* based on entrapment—the defendants were shown to have been predisposed, and the involvement of one of the defendants was in no way attributable to the Government—the central theme of the majority opinion is that, even though predisposed, the defendants had in fact been induced to commit a crime they would not otherwise have been likely to commit. The court quoted the following language from its earlier decision in *U.S. v. West*, 511 F.2d 1083, 1085 (3d Cir. 1975):

> ". . . Moreover, such conduct does not facilitate discovery or suppression of ongoing illicit traffic in drugs. It serves no justifying social objective. Rather, it puts the law enforcement authorities in the position of creating new crime for the sake of bringing charges against a person they had persuaded to participate in wrongdoing."

And from the Ninth Circuit's decision in *Greene v. U.S.*, 454 F.2d 783, 787 (9th Cir. 1971):

> ". . . But, although this is not an entrapment case, when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative."

The court noted that Judge Powell's plurality Opinion in *Hampton* cited the *Greene* case with approval, and stated:

> "We are adhering to Justice Powell's reasoning that in evaluating whether Government conduct is

outrageous, the court must consider the nature of the crime and the tools available to law enforcement agencies to combat it." (588 F.2d, at p. 378, n. 6.)

The court distinguished *Hampton*, in the following language:

"*Hampton* was concerned with the sale of an illegal drug, a much more fleeting and elusive crime to detect than the operation of an illicit drug laboratory. In such a situation the practicalities of combating drug distribution may require more extreme methods of investigation, including the supply of ingredients which the drug ring needs [footnote omitted]. Furthermore, a reading of the jury instruction requested by the defendant in *Hampton* reveals that he was concerned merely with the principle that if the narcotics were supplied to him by an informant acting on behalf of the Government, then he must be acquitted as a matter of law . . . In this case, however, we are not only concerned with the supply by government agents of necessary ingredients for manufacture, but we also have before us a crime, unlike *Hampton*, conceived and contrived by government agents." (*Id.*, at p. 378.)

In my judgment, the circumstances of the present case argue more strongly for dismissal on due process grounds than the *Twigg* case. While municipal bribery may be "fleeting" and "elusive," so that governmental subterfuge and even creative involvement may be necessary to combat it, the techniques employed here went far beyond the necessities of legitimate law enforcement. It would undoubtedly be permissible for government agents to set up an undercover business entity, either real or imaginary, as an attractive target for corrupt overtures by

city officials, and even to hint that such overtures would be welcome. It would also probably be permissible for the undercover agents to initiate bribe proposals, at least in connection with suspected ongoing corrupt activities on the part of the targeted officials. But it is neither necessary nor appropriate to the task of ferreting out crime for the undercover agents to initiate bribe offers, provide extremely generous financial inducements, and add further incentives virtually amounting to an appeal to civic duty. In short, even if the entrapment issues were properly submitted to the jury in this case (and I have concluded that they should not have been), and even if the jury properly resolved them (and I have concluded that the evidence was insufficient as a matter of law), I am persuaded that the *Twigg* decision compels that judgments of acquittal be entered.

In *U.S. v. Archer, supra,* Judge Friendly expressed the view that the federal courts should not sanction the artificial federalization of purely state crimes. The rationale of that decision is equally applicable in the present case. Bribery is punishable under state law. When there is a pattern of bribery affecting interstate commerce, the RICO statute may properly be invoked, and its (greatly enhanced) penalties applied. But in the present case, it was the Government, and the Government alone, which created the pattern, as well as each bribe. The receipt of a bribe by each of these defendants would not have violated the RICO statute, but for the Government's having made sure that Criden was involved in other bribe activities.

Moreover, to permit this kind of artificial federalization would effectively remove virtually all of the limitations upon the criminal jurisdiction of federal courts, and would be utterly contrary to accepted notions of federalism. I do not mean to suggest that municipal corruption can never be a proper object of the attention of federal law

enforcement officers. But whatever may be the appropriate role of federal law enforcement in detecting and punishing municipal corruption, it is surely not within the legitimate province of federal agents to embark upon a program of corrupting municipal officials, merely to demonstrate that it is possible.

The defendants have presented several additional arguments in support of their due process contentions. Because these additional arguments are advanced by all four defendants, and because this Opinion deals only with the cases of the defendants Schwartz and Jannotti, these additional matters will be addressed in a separate opinion, which will be filed in due course.[7]

V. Conclusions

The conclusions expressed in the foregoing Opinion may be summarized as follows:

1. The evidence at trial did not establish actual or potential impact upon interstate commerce necessary to sustain the jurisdiction of this Court under the Hobbs Act, hence Count III of the Indictment must be dismissed for lack of jurisdiction, and the convictions on that count set aside.

2. The evidence at trial sufficed to establish each of the essential elements of the RICO conspiracy charge alleged in Count II of the Indictment.

3. Both defendants are entitled to judgments of acquittal on the ground that the evidence at trial established entrapment as a matter of law.

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7. The entrapment defenses asserted by the defendants Criden and Johanson cannot be addressed at this time, since they have not yet been tried on this Indictment. And the application of the *Twigg* and *Archer* doctrines to the cases of Criden and Johanson involve somewhat different considerations than in the cases of Schwartz and Jannotti.

a. The defense of entrapment is available to the defendants, since its assertion involved no inconsistency in fact or in law.

b. The Government is, as a matter of law, responsible for the actions of Criden and the undercover agents amounting to inducement.

c. The evidence at trial was, as a matter of law, insufficient to establish beyond a reasonable doubt that the defendants were predisposed.

4. Alternatively, the defendants are entitled to judgments of acquittal on the ground of governmental overreaching amounting to a violation of due process of law.

5. Alternatively, the defendants are entitled to judgments of acquittal on the ground that the circumstances relied upon to establish federal jurisdiction over the offenses charged were artifically created by the Government in an attempt to exceed the proper scope of federal law enforcement.

These conclusions have been reached with great reluctance. No-one who has viewed the videotape evidence in this case could avoid feelings of distress and disgust at the crass behavior the tapes reveal. The jury's verdict represents a natural human reaction to that evidence. But, in the long run, the rights of all citizens not to be led into criminal activity by governmental overreaching will remain secure only so long as the courts stand ready to vindicate those rights in every case.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 80-166

UNITED STATES OF AMERICA

v.

HARRY P. JANNOTTI
GEORGE X. SCHWARTZ

ORDER

AND NOW, this 26th day of November, 1980, it is ORDERED:

1. The verdict of the jury in this case is set aside in its entirety.

2. Count III of the Indictment is DISMISSED for lack of jurisdiction.

3. The respective motions of the defendant George X. Schwartz and Harry P. Jannotti for judgment of acquittal are GRANTED.

/s/ JOHN P. FULLAM
J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1020 and 81-1021

UNITED STATES OF AMERICA,
Appellant in No. 81-1020

v.

HARRY P. JANNOTTI

(D.C. Crim. No. 80-00166-02)

UNITED STATES OF AMERICA,
Appellant in No. 81-1021

v.

GEORGE X. SCHWARTZ

(D.C. Crim. No. 80-00166-04)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PRESENT: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and SLOVITER, *Circuit Judges*.

ORDER

A majority of the active judges having voted for rehearing in banc in the above appeal, it is

ORDERED that the Clerk of this Court list the above case for rehearing before the court in banc at the convenience of the Court.

BY THE COURT,

COLLINS J. SEITZ
Chief Judge

DATED: August 26, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1020/81-1021

UNITED STATES OF AMERICA,
Appellant in No. 81-1020

v.

JANNOTTI, HARRY P.

(D. C. Criminal No. 80-00166-02)

UNITED STATES OF AMERICA,
Appellant in No. 81-1021

v.

SCHWARTZ, GEORGE X.

(D. C. Criminal No. 80-00166-04)

(D. C. Criminal No. 80-00166-02 and 04)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Eastern District of

Pennsylvania and was argued by counsel on June 10, 1981 and reargued before the Court in banc on November 23, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court dated November 26, 1980 and entered November 28, 1980, dismissing Count III of the indictment and granting judgments of acquittal, be, and the same are hereby reversed, and the said District Court is directed to reinstate the jury's verdict.

ATTEST:

SALLY MRVOS
Clerk

February 11, 1982

Opposition

Office - Supreme Court, U.S.
FILED
NOV 12 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1899

In the Supreme Court of the United States

OCTOBER TERM, 1981

HARRY P. JANNOTTI AND GEORGE X. SCHWARTZ,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1899

HARRY P. JANNOTTI AND GEORGE X. SCHWARTZ,
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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the conduct of the government in the undercover operation known as ABSCAM requires dismissal of their prosecution and establishes entrapment as a matter of law. Petitioners also contend that the evidence against them is insufficient to prove an actual or potential effect upon interstate commerce necessary to sustain federal jurisdiction under the Hobbs Act and to show extortion under that Act.

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were found guilty of conspiring to obstruct interstate commerce, in violation of the Hobbs Act, 18 U.S.C. 1951(a). Petitioner Schwartz also was found guilty of conspiring to violate the Racketeer Influenced and Corrupt Organizations statute,

in violation of 18 U.S.C. 1962(d). Following entry of the guilty verdicts, petitioners renewed their motions for judgments of acquittal and dismissal of the indictment, on which the district court previously had reserved decision. On November 26, 1980, the district court entered an order setting aside the verdict of the jury in its entirety. The district court dismissed the Hobbs Act count for lack of jurisdiction and granted the motion for judgment of acquittal (Pet. App. A129-A178). The court of appeals, sitting en banc, reversed by a 7 to 2 vote (Pet. App. A1-A105). The court of appeals remanded the case to the district court for reinstatement of the jury's verdict and for imposition of sentence.

Petitioners contend that the government's conduct of ABSCAM violated the Due Process Clause and requires dismissal of the indictment (Pet. 10-16); that the evidence of government inducement to commit the crimes alleged is so overwhelming that it establishes entrapment as a matter of law (Pet. 17-20); that the evidence adduced was insufficient to predicate federal jurisdiction under the Hobbs Act (Pet. 20-26); and that the evidence was insufficient to show that petitioners extorted money in violation of the Hobbs Act (Pet. 26-28).

Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their post-trial motions. If, after imposition of sentence by the district court,[1] the court of appeals were to reverse petitioners' convictions and remand for a new trial because of trial error, their claims might be mooted by an

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[1]In criminal cases, a final judgment is not entered until sentence is imposed. *Berman* v. *United States*, 302 U.S. 211, 212 (1937).

acquittal following a second trial on the merits. On the other hand, should the court of appeals affirm their convictions after imposition of sentence, petitioners will then be able to submit their present contentions to this Court, together with any other claims they may have, in a single petition for a writ of certiorari seeking review of a final judgment of conviction. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1982

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[2]Because this case is interlocutory, we are not responding on the merits to the questions presented in the petition. Those questions are addressed in detail in the opinion of the en banc court of appeals (Pet. App. A1-A70). We will file a response on the merits if the Court requests.

DOJ-1982-05

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAY 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1899

IN THE

Supreme Court of the United States

October Term, 1981

HARRY P. JANNOTTI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

GEORGE X. SCHWARTZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY MEMORANDUM

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No. 81-1899

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HARRY P. JANNOTTI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

GEORGE X. SCHWARTZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY MEMORANDUM

In its Memorandum in Opposition, the government argues that petitioners' contentions "are not presently ripe for review by this Court" and that such review "would be premature at this time." (Mem. in Opp., at 2-3) The government further asserts, incorrectly, that the decision

of the Third Circuit reversing the Order of the District Court, setting aside the jury verdict, dismissing the Hobbs Act charges, and granting petitioners' motions for judgments of acquittal, is "interlocutory," thereby warranting denial of the instant Petition. (Mem. in Opp., at 3 n. 2.)

It is respectfully submitted that the posture taken by the government in this instance is erroneous, not only by its failure properly to enunciate the scope and nature of this Court's jurisdiction under 28 U. S. C. § 1254(1), but also by its refusal to appreciate the factors which this Court has historically employed in passing on certiorari petitions. For all of the reasons set forth below and in the Petition itself, petitioners submit that the requested Writ should issue.

1. Where, as in this case, this Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1254(1), issues of "finality" are irrelevant;[1] any implications to the contrary in the government's brief are without support and can safely be rejected. Furthermore, the judgment of acquittal entered by the District Court is a final and appealable order, by any definition, and review by this Court of an intermediate federal court's ruling on such an order is clearly appropriate.[2]

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1. Unlike the jurisdictional requirements of 28 U. S. C. §§ 1257 and 1258, which expressly contain a requirement of "finality," section 1254(1) specifically eschews such a standard, going so far as to permit review of a matter pending in a court of appeals prior to resolution by that court. Thus, neither on a formal or informal basis, is finality a factor under section 1254(1) and the government's statement that a criminal case is not final until sentence is imposed has no legal significance to this Court's decision to grant or deny certiorari.

2. This Court has frequently granted certiorari petitions in cases which were in the identical procedural posture as is the instant case. *See, e.g., Sanabria v. United States,* 437 U. S. 54 (1978); *Serfass v. United States,* 420 U. S. 377 (1975). And even

2. This Court has historically exercised its certiorari jurisdiction where, as in this instance, the legal and factual issues presented implicate vital public concerns and impact upon the proper functioning of our democratic society. *See, e.g., Lau v. Nichols,* 414 U. S. 563, 566 (1974); *Greenwood v. United States,* 350 U. S. 366, 373-374 (1956). Likewise, review is appropriate when significant constitutional and statutory issues are involved, particularly where similar issues are present in related cases now pending in the lower courts, *see, e.g., United States v. Donovan,* 429 U. S. 413, 416, 422 (1977); *Laing v. United States,* 423 U. S. 161, 167-168 (1976), and when resolution of such issues will have substantial ramifications on the conduct of law enforcement throughout the Nation. *E.g., McCarthy v. United States,* 394 U. S. 459, 464 (1969); *Carbo v. United States,* 364 U. S. 611, 613 (1961). Here, the constitutional and statutory issues which have arisen out of ABSCAM are anything but "academic or episodic," *Rice v. Sioux City Cemetery,* 349 U. S. 70, 74 (1955); to the contrary, the illegal and unconstitutional tactics employed by the government will become epidemic unless promptly condemned by this Court. And finally, as discussed at length in petitioners' initial Petition, a clear conflict among the Circuits exists on the Hobbs Act jurisdiction question, in itself of sufficient importance to warrant review.

This case meets each and every criteria for review which this Court has employed in passing on certiorari petitions. Review is, therefore, both appropriate and essential.

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2. (Cont'd)

where a judgment is plainly interlocutory, the presence of fundamental and significant issues of law which will affect further conduct of the case will justify the grant of certiorari. *E.g., Estelle v. Gamble,* 429 U. S. 97, *reh. denied* 429 U. S. 1066 (1976); *United States v. General Motors Corp.,* 323 U. S. 373 (1945).

3. The extraordinary significance of the issues raised herein and their impact upon the proper administration of justice is underscored by the decisions of those courts which have, to date, passed upon ABSCAM prosecutions. Both the District Court and the Third Circuit, as is discussed in the instant Petition, acknowledged the enormous importance of this case in no uncertain terms. Judge Fullam, in granting petitioners' motions for judgment of acquittal in this case, recognized that "[w]hile municipal bribery may be 'fleeting' and 'elusive,' so that governmental subterfuge and even creative involvement may be necessary to combat it, the techniques employed [in ABSCAM] went far beyond the necessities of legitimate law enforcement." A. 174. Judge Fullam further concluded, in commenting upon the import of this case, that:

> "... the rights of all citizens not to be led into criminal activity by governmental overreaching will remain secure so long as the courts stand ready to vindicate those rights in every case." A. 177.

In another, recently decided ABSCAM case, *United States v. Richard Kelly, et al.*, Crim. No. 80-00340 (D. D. C., May 13, 1982), Judge Bryant granted Congressman Kelly's motion for judgment of acquittal and recognized the uniqueness of ABSCAM in that it "create[d] a whole new type of crime that would not exist but for the government's actions." Slip Op'n., at 18. The *Kelly* court similarly noted that the ABSCAM operation "differed sharply from traditionally accepted types of [covert] operations" generally approved by the courts, *id.* at 13, and concluded:

> "Government agents, hard about the business of corrupting public officials who are free of suspicion, essentially subvert our government; and on its face this presents an unwholesome spectacle." *Id.* at 17.

In *United States v. Myers*, 527 F. Supp. 1206, 1215-16 (E. D. N. Y. 1981) (appeal pending), Judge Pratt decided the ultimate issues in the government's favor, unlike Judges Fullam and Bryant. However, even District Judge Pratt emphasized that ABSCAM involves "fundamental political and constitutional issues in which many segments of the population had an interest," raising "novel questions of great public importance." And in *United States v. Myers*, 635 F. 2d 932, 934 (2d Cir. 1980), the Second Circuit understood that, "[i]n a constitutional democracy this maneuver [the ABSCAM operation] inevitably raises sensitive issues of public policy and public law."

Despite the sharply divergent conclusions reached by those federal judges who have grappled with the ABSCAM cases, universal recognition of the significance and national importance of the issues raised by the government's ABSCAM operation plainly exists.

4. If, as the government suggests, this case must now be remanded to the district court for disposition of outstanding motions for a new trial, and should a new trial be granted at any future point in time and prior to this Court's resolution of the issues raised by the instant Petition, or should petitioners be acquitted of the charges at a new trial,[3] the issues raised by this case will never be subject to review by this Court. Although, where less significant matters are concerned, such a result might be consistent with interests of judicial economy, where, as here, fundamental constitutional and public policy issues

3. It should be emphasized that, in the event a new trial is granted prior to review of the Third Circuit's decision, the trial court would be compelled to adhere to the appellate court's rulings at a second trial. However, should this Court ultimately determine that those rulings were erroneous, the second trial would likewise be defective and yet a third trial would be required.

are present in abundance, such a result is plainly unacceptable.

Furthermore, as the finality of the judgments of acquittal entered by the District Court is clear, Petitioners themselves have a legitimate interest in protecting the finality of this ruling. Moreover, they have a real interest in obtaining review of the Third Circuit's decision before being required to confront the financial and emotional rigors of further proceedings. If the Third Circuit was in error, as petitioners believe, this case would be concluded with a decision of this Court, and the interests of all concerned, on the public, private, and governmental levels, will be fully and properly served.

In short, by its refusal to respond, on the merits, to the instant Petition, the government exhibits an astounding insensitivity to the legitimate interests of petitioners and underscores the significance of the jurisprudential and constitutional issues raised by ABSCAM and the need for prompt consideration of these issues by this Court. The fair and orderly administration of justice requires nothing less.

Respectfully submitted,

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